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No. 91-1438

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GREAT WESTERN COAL (KENTUCKY), INC. and GREAT WESTERN COAL INC.,
Petitioners,

v.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY and KENNETH R. FORD,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a state-owned corporation with full corporate powers, including the power to sue and be sued and to enter into contracts, is a "citizen[ ]" of a "State[ ]" for purposes of diversity jurisdiction under 28 U.S.C. § 1332(a)(1)?

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PETITION FOR A WRIT OF CERTIORARI

Great Western Coal (Kentucky), Inc. and Great Western Coal Inc. (collectively "Great Western") petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.[1]

[1] The parent company of petitioner Great Western Coal Inc. is Great Western Resources Inc. Great Western Coal Inc. has no subsidiaries except wholly-owned subsidiaries. The parent company of petitioner Great Western Coal (Kentucky), Inc. is Great Western Coal Inc. Great Western Coal (Kentucky), Inc. has no subsidiaries except wholly-owned subsidiaries. *See* Sup. Ct. R. 29.1.

OPINIONS BELOW

The opinion of the court of appeals is unreported. It appears at App. 1a-2a.[2] The opinion of the district court is also unreported. That opinion appears at App. 5a-8a.

JURISDICTION

The judgment of the court of appeals was entered on December 9, 1991. No petition for rehearing was filed. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutory provisions involved are 28 U.S.C. § 1332 (App. 9a-10a) and S.C. Code Ann. §§ 58-31-10 through 58-31-450 (App. 11a-43a).

STATEMENT OF THE CASE

Great Western and the South Carolina Public Service Authority ("Santee Cooper") are parties to two long-term coal supply contracts. Great Western mines and sells the coal; Santee Cooper—a state-owned South Carolina corporation—purchases and burns the coal to generate electricity. Each contract contains an arbitration clause that requires Great Western and Santee Cooper to arbitrate all disputes "arising out of or related to" the contract.

On November 21, 1990, Santee Cooper filed suit in South Carolina state court against Great Western, its then-president Clyde E. Goins, Sr., and a former vice-president of Santee Cooper, Joe C. Norman.[3] Santee

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[2] The appendix that accompanies this petition will be cited as "App."

[3] *South Carolina Public Service Authority* v. *Great Western Coal (Kentucky), Inc., et al.*, No. 90-CP-08-1760 (S.C.C.P. Berkeley County Nov. 21, 1990).

Cooper's state court complaint purported to allege various tort causes of action. The eight-page complaint made seventeen references to Santee Cooper's two coal contracts with Great Western.[4]

On December 11, 1990, after sending a written demand for arbitration to Santee Cooper pursuant to the two coal contracts, Great Western filed an action against Santee Cooper and its president, Kenneth R. Ford, in the United States District Court for the Eastern District of Kentucky to compel arbitration under the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1-16. Because the FAA provides no independent jurisdictional basis, Great Western asserted subject-matter jurisdiction in the district court on the basis of diversity of citizenship. *See* 28 U.S.C. § 1332(a)(1).[5]

Great Western applied to the district court for a preliminary injunction against further proceedings in South Carolina state court and for an order compelling arbitration. Santee Cooper moved to dismiss Great Western's complaint for lack of subject-matter jurisdiction and on other grounds. In its motion to dismiss, Santee Cooper contended that it is an "alter ego" of the State of South Carolina and therefore is not a "citizen[] of a "State[]" under 28 U.S.C. § 1332(a)(1). After oral argument on January 18, 1991, the district court denied Great West-

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[4] On January 22, 1991, Santee Cooper amended its state court complaint to reassert five of the original six causes of action, but with all references to the two coal contracts removed.

[5] Section 1332(a)(1) vests the district court with subject-matter jurisdiction over civil actions between "citizens of different States" where the amount in controversy exceeds $50,000. It is undisputed that the Great Western corporations are incorporated in Delaware with their principal place of business in Kentucky; that Santee Cooper is incorporated in South Carolina with its principal place of business in that State; and that Mr. Ford, the president of Santee Cooper, is a citizen of South Carolina. Thus, there is complete diversity between the parties. It is also undisputed that the amount in controversy exceeds $50,000.

ern's motion for a preliminary injunction, citing *Younger* v. *Harris*, 401 U.S. 37 (1971). The district court withheld ruling on Santee Cooper's motion to dismiss Great Western's complaint.[6]

Great Western appealed the district court's denial of the preliminary injunction to the United States Court of Appeals for the Sixth Circuit.[7] On August 28, 1991, while Great Western's appeal was pending, the district court granted Santee Cooper's motion to dismiss for lack of subject-matter jurisdiction. App. 3a-8a. Citing *Moor* v. *County of Alameda*, 411 U.S. 693, 717 (1973), the district court noted that "a state is not a 'citizen' " under 28 U.S.C. § 1332(a)(1) and that "a suit against 'an arm

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[6] Following the district court's denial of Great Western's motion for a preliminary injunction, Great Western moved the South Carolina trial court to dismiss Santee Cooper's complaint for lack of jurisdiction over an arbitrable dispute or, in the alternative, to stay the proceedings and compel arbitration. In March 1991, the South Carolina trial court denied Great Western's motion to dismiss and held "in abeyance" Great Western's alternative motion to compel arbitration and stay proceedings. Great Western appealed the trial court's ruling to the South Carolina Supreme Court. Santee Cooper moved to dismiss the appeal. On July 3, 1991, the South Carolina Supreme Court granted Santee Cooper's motion and dismissed the appeal "without prejudice to any party's right to appeal the final order determining whether the claims are to be submitted to mandatory arbitration." Great Western renewed its motion before the state trial court to compel arbitration and stay proceedings. The trial court denied Great Western's renewed motion on September 4, 1991 on a basis not briefed or argued by the parties. Great Western has appealed that order to the South Carolina Supreme Court. The appeal has been fully briefed; oral argument is not yet scheduled.

[7] On appeal, Great Western contended that the district court erred in abstaining under *Younger* v. *Harris*, 401 U.S. 37 (1971), because of the powerful federal interest in enforcing arbitration agreements, *see, e.g., Moses H. Cone Memorial Hospital* v. *Mercury Construction Corp.*, 460 U.S. 1, 22-26 (1983); because the federal right at stake was the right *not to be subjected to the judicial process*, a right that would be lost if federal court review were delayed; and because Santee Cooper's state court action implicated no state interests important enough to warrant *Younger* abstention.

or an alter ego of the State' is a suit against the state." App. 6a. The court declared that, in determining whether an entity is an "alter ego" of the state, "[n]umerous factors are relevant . . . but state court decisions are persuasive if not conclusive on the question." App. 6a (quotation omitted). The court listed six general "indicia of identity with the state"[8] and ten "facts" about Santee Cooper.[9] From these "factors," "indicia," and "facts," the district court concluded that Santee Cooper is South Carolina's "alter ego." App. 8a.

Great Western appealed from the district court's August 28 order and judgment. The court of appeals consolidated Great Western's appeal from the district court's August 28 order with its appeal from the district court's January 18 order denying Great Western's motion for a preliminary injunction. On December 9, 1991, the Sixth Circuit affirmed the district court's August 28 judgment dismissing Great Western's complaint for lack of subject-matter jurisdiction. App. 1a-2a. The court of appeals'

[8] The "indicia" that the district court listed were "(1) legislative monitoring of the agency, (2) political appointment of the agency's trustees or directors, (3) the placement of high government officials in the agency's key positions, (4) the agency's tax status, (5) the agency's condemnation authority, and (6) the agency's concern with state-wide, as opposed to local, problems." App. 6a (quotation and brackets omitted).

[9] The ten "facts" that the district court listed are (1) that Santee Cooper can establish state-wide offices, (2) that Santee Cooper's directors are political appointees, (3) that Santee Cooper's directors report to an advisory board made up of South Carolina's top executive branch officials, (4) that the South Carolina governor submits Santee Cooper's annual report to the legislature, (5) that Santee Cooper can develop rivers, acquire and sell water, reclaim land, and reforest watersheds and rivers, (6) that Santee Cooper can condemn land, (7) that Santee Cooper's functions are for the benefit of South Carolina's people, (8) that Santee Cooper is tax exempt, (9) that Santee Cooper's net earnings are paid into South Carolina's general fund semi-annually, and (10) that Santee Cooper's annual budget is submitted to the legislature and printed as a regular part of the appropriations act. App. 7a-8a.

unreported, per curiam decision expressly adopted the reasoning of the district court. App. 2a.[10]

REASONS FOR GRANTING THE PETITION

I. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH THIS COURT'S DECISION IN *MOOR* v. *COUNTY OF ALAMEDA*.

The court of appeals' ruling—adopting the reasoning of the district court—conflicts directly with this Court's decision in *Moor* v. *County of Alameda*, 411 U.S. 693 (1973).

In *Moor*, the Court held that the County of Alameda was a citizen of the State of California. The Court declared that "a political subdivision of a State, unless it is simply the arm or *alter ego* of the State, is a citizen of

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[10] While Great Western has attempted to vindicate its right to arbitrate under the FAA and the two coal contracts, Santee Cooper has used the South Carolina prejudgment attachment statute to seize more than $30 million that it owes to Great Western for coal delivered. In August 1991, as a direct result of Santee Cooper's refusal to pay for coal it had received, Great Western was forced to suspend shipments of coal, lay off 170 employees, and curtail contract mining operations that affected another 200 workers. On August 29, 1991, Santee Cooper unilaterally declared the two coal contracts cancelled and terminated.

Great Western has challenged the constitutionality of the prejudgment seizure of its funds in the federal and state courts of South Carolina. On May 3, 1991, Great Western moved to dissolve the attachment in the South Carolina trial court. That court denied relief, and Great Western appealed to the South Carolina Supreme Court. The appeal is scheduled for oral argument on March 23, 1992. Also on May 3, 1991, Great Western filed suit in federal district court in South Carolina under 42 U.S.C. § 1983 seeking to enjoin the attachment and to obtain other relief. The district court denied preliminary relief in June 1991, and Great Western appealed to the United States Court of Appeals for the Fourth Circuit. After twice entering orders granting Great Western injunctive relief on the merits pending appeal, the Fourth Circuit recently dismissed the appeal on jurisdictional grounds and remanded the case to the district court.

the State for diversity purposes." *Id.* at 717 (quotation and footnote omitted). The Court explained that the "original source" of this principle "was the rule that corporations are citizens of the State in which they are formed, and are subject as such to the diversity jurisdiction of the federal courts." *Id.* at 718.

In holding an entity's corporate status determinative, *Moor* relied upon the "seminal case" of *Cowles* v. *Mercer County*, 74 U.S. (7 Wall.) 118 (1869). *See* 411 U.S. at 718. In *Cowles*, this Court held that the Mercer County Board of Supervisors was a citizen of Illinois for diversity purposes. *See* 74 U.S. (7 Wall.) at 121-22. The Court noted that "[t]he board of supervisors is a corporation created by acts of the legislature of Illinois," and it declared that "a corporation created by the laws of a State, and having its place of business within that State, must, for the purposes of suit, be regarded as a citizen within the meaning of the Constitution giving jurisdiction founded upon citizenship." *Id.* at 121. The Court concluded:

> It is enough for this case that we find the board of supervisors to be a corporation authorized to contract for the county. *The power to contract with citizens of other States implies liability to suit by citizens of other* States, and no [state] statute limitation of suability can defeat a jurisdiction given by the Constitution.

Id. at 122 (emphasis added).

As *Moor* and *Cowles* make clear, a separately incorporated political subdivision is a "citizen[]" of a "State[]" for purposes of diversity jurisdiction. It is undisputed that Santee Cooper—like Alameda County in *Moor* and the Board of Supervisors of Mercer County in *Cowles*—is a corporation with corporate powers. *See, e.g.*, S.C. Code Ann. §§ 58-31-10, -30, -110. As in *Cowles*, Santee Cooper has the "power to contract with citizens of other States"; in fact, it exercised that power to enter into the

two coal contracts at issue here. Under *Moor* and *Cowles*, therefore, Santee Cooper is a "citizen[]" of South Carolina.

The *Moor* Court rejected Alameda County's contention —analogous to Santee Cooper's contention in the lower courts—that, despite its separate corporate existence, "it is, under California law, nothing more than an agent or a mere arm of the State itself." 411 U.S. at 718-19. Ten factors informed the Court's analysis:

> [1] *Most notably*, under California law a county is given "corporate powers" and is designated a "body corporate and politic." In this capacity, [2] a county may sue and be sued, and, [3] significantly for purposes of suit, it is deemed to be a "local public entity" in contrast to the State and state agencies. In addition, [4] the county, and from all that appears the county alone, is liable for all judgments against it and [5] is authorized to levy taxes to pay such judgments. [6] A California county may also sell, hold, or otherwise deal in property, and [7] it may contract for the construction and repairs of structures. [8] The counties also are authorized to provide a variety of public services such as water service, flood control, rubbish disposal, and harbor and airport facilities. [9] Financially, the counties are empowered to issue general obligation bonds payable from county taxes. [10] Such bonds create no obligation on the part of the State, except that the State is authorized to intervene and to impose county taxes to protect the bondholders if the county fails to fulfill its obligations voluntarily. In sum, these provisions strike us as persuasive indicia of the independent status occupied by California counties relative to the State of California.

Id. at 719-20 (emphasis and bracketed material added) (footnotes omitted).

An analysis of Santee Cooper's governing statute in light of the ten *Moor* factors makes clear that Santee

Cooper is not an "alter ego" of the State of South Carolina.

—*First* and "[m]ost notably," 411 U.S. at 719, Santee Cooper is given "corporate powers" and is designated "a body corporate and politic" under state law. S.C. Code Ann. §§ 58-31-10 ("body corporate and politic"), -30 (corporate powers), -110 (Santee Cooper "is a corporation").[11]

—*Second*, Santee Cooper may sue and be sued. *Id.* § 58-31-30(2).

—*Third*, Santee Cooper's electric service area encompasses just three of South Carolina's forty-six counties and several of its other functions are similarly limited,[12] giving it an essentially local character. *Id.* § 58-31-30; *see SCPSA* v. *New York Casualty Co.*, 74 F. Supp. 831, 839 (E.D.S.C. 1947) ("It is clear that the General Assembly intended to limit [Santee Cooper] and had no intention of making it a statewide operator.").[13]

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[11] Santee Cooper has a broad range of corporate powers, including the power to adopt, use, and alter a corporate seal, S.C. Code Ann. § 58-31-30(3); the power to make bylaws for the management and regulation of its affairs, *id.* § 58-31-30(11); and the power to appoint officers, agents, and employees, to prescribe their duties, and to fix their compensation, *id.* § 58-31-30(12).

[12] For example, Santee Cooper's power to develop rivers is limited to "the Cooper River, the Santee River, and the Congaree River." S.C. Code Ann. § 58-31-30. Its power to divert waters is limited to the Santee River. *Id.* § 58-31-30(6). Its power to reforest is limited to "the watersheds of the Cooper, Santee and Congaree Rivers." *Id.* § 58-31-30(10). Its power to investigate, study, and consider undeveloped power sites and navigation projects is "limited to the Congaree River and its tributaries below the confluence of the Broad and Saluda Rivers and the Wateree tributary of the Santee River at and near a point at or near Camden, South Carolina." *Id.* § 58-31-30(21).

[13] In *New York Casualty Co.*, Chief Judge Waring carefully analyzed Santee Cooper's governing statute and concluded that it was

—*Fourth*, Santee Cooper alone "is liable for all judgments against it," 411 U.S. at 719, since none of Santee Cooper's obligations shall "be deemed to be obligations of the State or any of its political subdivisions," S.C. Code Ann. § 58-31-30(21); *see id.* §§ 58-31-130, -140.

—*Fifth*, although Santee Cooper apparently does not have the power to levy taxes, it does have the power to issue bonds, to borrow money, and to use other means to raise money. *See id.* § 58-31-30(14), -30(21).

—*Sixth*, Santee Cooper has the power to "sell, hold, or otherwise deal in property." 411 U.S. at 719; *see* S.C. Code Ann. §§ 58-31-30(4), -50.

—*Seventh*, Santee Cooper has the power to "make contracts of every name and nature." *Id.* § 58-31-30(17).

—*Eighth*, Santee Cooper is "authorized to provide a variety of public services," 411 U.S. at 719-20, including the provision of electricity, the construction of dams, locks, and similar structures, reclamation, and reforestation, S.C. Code Ann. §§ 58-31-30(5)-(10).

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a citizen of the State of South Carolina for diversity purposes. 74 F. Supp. at 839. Chief Judge Waring later came to the opposite conclusion in light of an intervening state court decision, apparently in the mistaken belief that he was bound by *Erie R. Co.* v. *Tompkins*, 304 U.S. 64 (1938), to accept the state court characterization of Santee Cooper. *Dupont* v. *SCPSA*, 100 F. Supp. 778, 781 (E.D.S.C. 1951). As this Court made clear in *Moor*, a federal court must make its own assessment of a state-owned corporation's status for diversity purposes. *See Moor*, 411 U.S. at 719-21; *cf. Ram Ditta* v. *Maryland National Capital Park and Planning Commission*, 822 F.2d 456, 458 n.5 (4th Cir. 1987) (whether agency is an alter ego of the state for Eleventh Amendment purposes is a question of federal, not state, law).

—*Ninth*, Santee Cooper is entitled to issue bonds and to raise money for payment of the bonds. *Id.* §§ 58-31-30(14), -30(21).

—*Tenth*, Santee Cooper's bonds "create no obligation on the part of the State." 411 U.S. at 720; *see* S.C. Code Ann. §§ 58-31-30(21), -130, -140.[14]

Another key provision of Santee Cooper's governing statute demonstrates that Santee Cooper is not a mere "alter ego" of the State of South Carolina. The statute provides that, with minor exceptions, Santee Cooper's statutory powers "shall be exercised by the board of directors." *Id.* at § 58-31-60. The statute adds that "[t]he position of director of [Santee Cooper] is not a public office, and the State shall in no wise be responsible for the acts of the directors, but each director and his surety and [Santee Cooper] shall be responsible for all acts of the director in connection with the functions herein provided for." *Id.* Thus, § 58-31-60 makes clear that Santee Cooper's directors are not public officials; it expressly distinguishes between the State and Santee Cooper for purposes of liability; and it absolves the State of any liability for the official acts of Santee Cooper's directors.

Santee Cooper shares the features that caused this Court in *Moor* to reject Alameda County's contention that it was an "alter ego" of the state. South Carolina's statutory immunity from liability for the official acts of Santee Cooper's directors confirms that Santee Cooper enjoys significant independence from the State. Because the Sixth Circuit's holding that Santee Cooper is not a "citizen[]" of a "State[]" under 28 U.S.C. § 1332(a)(1) conflicts squarely with *Moor*, this Court should grant certiorari and reverse the judgment of the court of appeals.

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[14] Remarkably, none of the six "indicia of identity with the state" and few, if any, of the ten "facts" about Santee Cooper on which the district court relied, *see supra* notes 8 and 9, intersect with the ten factors that this Court found determinative in *Moor*.

II. THE QUESTION IS AN IMPORTANT ONE THAT HAS PRODUCED CONTINUING CONFUSION IN THE LOWER FEDERAL COURTS.

In the nineteen years since *Moor*, the lower federal courts have failed to devise clear standards for determining when state-owned corporations are "citizens" of "States" for diversity purposes. The courts have developed lists of factors to be applied and weighed, without any reasoned explanation for the choice of factors or for the weight that particular factors are given. The result is a confusing hodge-podge of decisions in which the lower courts have found some state-owned corporations to be "citizens" and others not to be.[15]

A comparison of recent cases illustrates the lack of principled decisionmaking on this issue. On one hand, courts have found a number of state-owned corporations to be "citizens" of "States" for diversity purposes. *See, e.g., Indiana Port Commission* v. *Bethlehem Steel Corp.*, 702 F.2d 107, 109-10 (7th Cir. 1983) (Indiana Port Commission); *Coastal Petroleum Co.* v. *U.S.S. Agri-Chemicals*, 695 F.2d 1314, 1317-18 (11th Cir. 1983) (Board of Trustees of Florida Internal Improvement Trust Fund); *Geeslin* v. *Merriman*, 527 F.2d 452, 455-56 (6th Cir. 1975) (Special Deputy Insurance Commissioner for Indiana); *University System of New Hampshire* v. *U.S. Gypsum Co.*, 756 F. Supp. 640, 644-47 (D.N.H. 1991) (University System of New Hampshire); *University of Rhode Island* v. *A.W. Chesterton Co.*, 721 F. Supp. 400, 402-03 (D.R.I. 1989) (University of Rhode Island); *Morrison-Knudsen Co.* v. *MBTA*, 573 F. Supp. 698, 701-05 (D. Idaho 1983) (Massachusetts Bay Transportation

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[15] Courts employ virtually the same analysis to determine whether a state-owned corporation shares the state's Eleventh Amendment immunity as they do to determine whether the corporation is a "citizen[]" of a "State[]" for diversity purposes. *See, e.g., Northeast Federal Credit Union* v. *Neves*, 837 F.2d 531, 534 (1st Cir. 1988). Any decision by this Court on the citizenship issue will guide the lower courts' analysis of the Eleventh Amendment issue as well.

Authority); *State* v. *Fedders Corp.*, 524 F. Supp. 552, 556-57 (M.D. La. 1981) (Louisiana Department of Urban and Community Affairs).

On the other hand, courts have found many functionally similar entities *not* to be citizens. *See, e.g.*, *Hughes-Bechtol, Inc.* v. *West Virginia Board of Regents*, 737 F.2d 540, 543-44 (6th Cir.) (West Virginia Board of Regents), *cert. denied*, 469 U.S. 1018 (1984); *Tradigrain, Inc.* v. *Mississippi State Port Authority*, 701 F.2d 1131, 1132-34 (5th Cir. 1983) (Mississippi State Port Authority); *Krieger* v. *Trane Co.*, 765 F. Supp. 756, 758-62 (D.D.C. 1991) (University of the District of Columbia); *University of Tennessee* v. *United States Fidelity & Guaranty Co.*, 670 F. Supp. 1379, 1382-87 (E.D. Tenn. 1987) (University of Tennessee); *M-K Engineering Co.* v. *Alaska Power Authority*, 662 F. Supp. 303 (D. Alaska 1986) (Alaska Power Authority); *State* v. *Home Depot, Inc.*, 589 F. Supp. 1254, 1256 (E.D. La. 1984) (Louisiana Department of Urban and Community Affairs); *Gibson-Homans Co.* v. *New Jersey Transit Corp.*, 560 F. Supp. 110, 112-14 (D.N.J. 1982) (New Jersey Transit Corporation).

These decisions cannot be reconciled. The result in each case appears to turn upon which of the entity's characteristics the court chooses to emphasize. The district court's approach in this case typifies the lower courts' unguided decisionmaking. The court gave no weight to (and did not even mention) the factors that show Santee Cooper to be a "citizen[]" under *Moor*, including its separate corporate status, its power to sue and be sued and to enter into contracts, and its financial independence. Instead of following the *Moor* analysis, the district court rested its decision on a series of other factors, plucked seemingly at random from prior cases, that it deemed significant. The district court's unexplained selection and weighing of factors, adopted by the court of appeals, underscores the need for clarification from this Court.

The question whether a state-owned corporation is a "citizen[]" for diversity purposes has enormous practical significance. In this case, for example, the absence of a federal forum has forced Great Western to rely upon the state courts of South Carolina to enforce its right to arbitrate the disputes with Santee Cooper. Not surprisingly in light of Great Western's status as an out-of-state coal company litigating against an in-state utility, the South Carolina courts have thus far refused to order arbitration and appear determined to force the matter to trial before a South Carolina jury. It is in precisely this situation—when an out-of-state litigant is sued in state court by a powerful local adversary—that the federal courts' diversity jurisdiction is most important.

Because the question of a state-owned corporation's status as a "citizen[]" has produced confusion in the lower federal courts and is of great practical significance, the Court should grant certiorari to decide the issue.

CONCLUSION

For the reasons stated, certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Dec. 9, 1991]

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 91-5251/6052

GREAT WESTERN COAL (KENTUCKY), INC.
and GREAT WESTERN COAL, INC.,
Plaintiffs-Appellants,

v.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY
and KENNETH R. FORD,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Kentucky

BEFORE: KENNEDY and JONES, Circuit Judges, and CONTIE, Senior Circuit Judge.

PER CURIAM: Great Western Coal (Kentucky), Inc. and Great Western Coal, Inc. appeal the order of the District Court dismissing this action for lack of jurisdiction. The District Court held that no diversity jurisdiction exists under 28 U.S.C. § 1332 because defendants are the alter-ego of the State of South Carolina and are not citizens of the State for purposes of diversity jurisdiction.

Upon consideration of the entire record, the briefs filed herein, and oral arguments, we affirm the judgment of the District Court for the reasons stated by District Court Judge Eugene E. Siler, Jr. in his Memorandum filed August 28, 1991.

ISSUED AS MANDATE: 1/2/92

Costs: No Costs

A TRUE COPY

Attest:

LEONARD GREEN

By /s/ Diane Schnur
Clerk
Deputy Clerk

APPENDIX B

[Filed Aug. 28, 1991]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

Civil Action No. 90-246

GREAT WESTERN COAL (KENTUCKY), INC.
and GREAT WESTERN COAL, INC.,
Plaintiffs,

vs.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY AND KENNETH R. FORD, in his official capacity as President of the South Carolina Public Service Authority,
Defendants.

ORDER

It is hereby ORDERED AS FOLLOWS:

1. In accordance with the memorandum of even date, the defendants' motion to dismiss for lack of jurisdiction be and is granted.

2. The defendants' motion to dismiss for insufficient service of process and improper venue be and is denied as moot.

3. The plaintiffs' motions to compel arbitration, for leave to file a notice of filing and supplemental memorandum in support of motion to compel arbitration, and for a hearing be and are denied as moot.

This 28th day of August, 1991.

/s/ Eugene E. Siler, Jr.
EUGENE E. SILER, JR.
Chief Judge

APPENDIX C

[Filed Aug. 28, 1991]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

Civil Action No. 90-246

GREAT WESTERN COAL (KENTUCKY), INC.
and GREAT WESTERN COAL, INC.,
Plaintiffs,

vs.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY AND KENNETH R. FORD, in his official capacity as President of the South Carolina Public Service Authority,
Defendants.

JUDGMENT

In accordance with the memorandum of even date, it is hereby

ORDERED AND ADJUDGED that the plaintiff take nothing and that the defendant be and is granted judgment against the plaintiff, with the plaintiff to pay the costs of this action.

This 28th day of August, 1991.

/s/ Eugene E. Siler, Jr.
EUGENE E. SILER, JR.
Chief Judge

APPENDIX D

[Filed Aug. 28, 1991]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF KENTUCKY
LONDON

Civil Action No. 90-246

GREAT WESTERN COAL (KENTUCKY), INC.
and GREAT WESTERN COAL, INC.,
Plaintiffs,

vs.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY AND KENNETH R. FORD, in his official capacity as President of the South Carolina Public Service Authority,
Defendants.

MEMORANDUM

I. *INTRODUCTION*

On December 31, 1990, defendants moved the Court to dismiss this contract action for lack of subject matter jurisdiction. For the following reasons, the Court will grant defendants' motion.

II. *LEGAL AUTHORITY AND ANALYSIS*

The party invoking federal jurisdiction has the burden of proof regarding it. *Cole v. Great Atl. and Pac. Tea Co.*, 728 F. Supp. 1305, 1307 (E.D. Ky. 1990) (citing *McNutt v. Gen. Motors Acceptance Corp.*, 298 U.S. 178, 189 (1936)). The Court should resolve any doubts as to federal jurisdiction against its invocation. *Id.* at 1307

(quoting *Walsh v. Am. Airlines, Inc.*, 264 F. Supp. 514, 515 (E.D. Ky. 1967)).

This Court has jurisdiction over controversies between "citizens of different states." 28 U.S.C. § 1332(a)(1). However, a state is not a "citizen." *Moor v. County of Alameda*, 411 U.S. 693, 717 (1973). Moreover, a suit against "an arm or an alter ego of the State" is a suit against the state. *Id.* at 717. A state agency is a "citizen" only if it is independent, separate, and distinct from the state. *Tradigrain, Inc. v. Miss. State Port Auth.*, 701 F.2d 1131, 1132 (5th Cir. 1983).

Numerous factors are relevant in determining whether an agency is an arm of the state, but state court decisions are "persuasive if not conclusive" on the question. *Hughes-Bechtol, Inc. v. W. Virginia Bd. of Regents*, 737 F.2d 540, 543 (6th Cir.), *cert. denied*, 469 U.S. 1018 (1984) (state agency's status "is governed by" state law); *Harrison Constr. Co. v. Ohio Turnpike Comm'n*, 272 F.2d 337, 339 (6th Cir. 1959); *Univ. of Tenn. v. United States Fidelity & Guar. Co.*, 670 F. Supp. 1379, 1381 (E.D. Tenn. 1987).

Other indicia of identity with the state include: (1) legislative monitoring of the agency, (2) political appointment of the agency's trustees or directors, (3) the "placement of high government officials in [the agency's] key positions," (4) the agency's tax status, (5) the agency's condemnation authority, and (6) the agency's concern with state-wide, as opposed to local, problems. *Tradigrain, Inc.*, 701 F.2d at 1132; *M-K Engineering Co., Inc. v. Alaska Power Auth.*, 662 F. Supp. 303, 304-08 (D. Alaska 1986) (Alaska Power Authority is an arm of the state); *Gibson-Homans Co. v. N.J. Transit Corp.*, 560 F. Supp. 110, 112-14 (D.N.J. 1982) (Transit Corp., which provides rail service, is state's alter ego); *Hughes-Bechtol, Inc. v. W. Va. Bd. of Regents*, 527 F. Supp. 1366, 1374-76 (S.D. Ohio 1981), *aff'd*, 737 F.2d 540 (6th Cir.), *cert. denied*, 469 U.S. 1018 (1984); *Hughes Co. v. Turn-*

pike Auth. of Ky., 353 F. Supp. 1105, 1106 (E.D. Ky. 1973).

Both federal and state courts have held that SCPSA is an "arm" of South Carolina. *Oakland Club v. S.C. Pub. Serv. Auth.*, 110 F.2d 84, 85 (4th Cir. 1940) (the SCPSA is an "instrumentality of . . . South Carolina"); *Dupont v. S.C. Pub. Serv. Auth.*, 100 F. Supp. 778, 780 (E.D.S.C. 1951) (citing *Rice Hope Plantation v. S.C. Pub. Serv. Auth.*, 59 S.E.2d 132, 138 (S.C. 1950) (the SCPSA "is completely identified with" South Carolina)), *overr'd*, 329 S.E.2d 741 (1985) (overruling *Rice* "to the extent that" it held "that an action may not be maintained against the State without its consent"); *S.C. Elec. and Gas Co. v. S.C. Pub. Serv. Auth.*, 54 S.E.2d 777, 786 (S.C. 1949) (the SCPSA "is . . . a state agency"); *Creech v. S.C. Pub. Serv. Auth.*, 20 S.E.2d 645, 648 (S.C. 1942).

The following facts lend credence to the foregoing decisions:

1. The SCPSA can establish offices throughout South Carolina. S.C. Code Ann. § 58-31-10 (Law Co-op.).

2. The SCPSA's directors are appointed by South Carolina's Governor, with the advice and consent of South Carolina's Senate, from each congressional district, specified counties, and the state at large. *Id.* at § 58-31-20.

3. The SCPSA's board of directors reports to an advisory board, consisting of South Carolina's Governor, Attorney General, Treasurer, Comptroller, and Secretary of State, annually. *Id.*

4. South Carolina's Governor submits the SCPSA's annual report, which contains a financial statement, an audit of affairs, and other information, to South Carolina's General Assembly. *Id.*

5. The SCPSA can develop rivers for commerce, navigation, production, and electric power, acquire and sell

water, reclaim land, and reforest watersheds and rivers. *Id.* at § 58-31-30.

6. The SCPSA can condemn land. *Id.*

7. The SCPSA's functions are for South Carolina's people's benefit and "the improvement of their health and welfare . . . , and are public purposes." *Id.* at § 58-31-80.

8. The SCPSA is tax exempt. *Id.*

9 The SCPSA's net earnings are paid into South Carolina's general fund semi-annually. *Id.*

10. The SCPSA's annual budget is submitted to South Carolina's House Ways and Means Committee and "printed as a regular part of the General Appropriation Act." *Id.* at § 58-31-400.

"Diversity jurisdiction does not exist unless each defendant is a citizen of a different state from each plaintiff." *Owens Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 376 (1978). The presence of a single "alter ego" of a state defeats diversity. *See Burbank v. Nev.*, 658 F.2d 708, 709 (9th Cir. 1981); *Mo. Pac. R.R. v. Travelers Ins. Co.*, 281 F. Supp. 100, 101-02 (E.D. La. 1968). Since the SCPSA is South Carolina's alter ego, its presence as a party to this action defeats diversity jurisdiction. Accordingly, the Court will dimiss this action.

This 28 day of August, 1991.

/s/ Eugene E. Siler, Jr.
EUGENE E. SILER, JR.
Chief Judge

APPENDIX E

28 U.S.C. § 1332

§ 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $50,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603(a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $50,000, computed without regard to any setoff or counterclaim to which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

APPENDIX F

CODE OF LAWS OF SOUTH CAROLINA 1976

TITLE 58. PUBLIC UTILITIES, SERVICES AND CARRIERS

CHAPTER 31. PUBLIC SERVICE AUTHORITY

ARTICLE 1. GENERAL PROVISIONS

§ 58-31-10. Creation of South Carolina Public Service Authority; offices.

There is hereby created a body corporate and politic to be known as the South Carolina Public Service Authority (herein called the "Public Service Authority"), with a principal office in the town of Moncks Corner near the Santee-Cooper power dam and navigation locks in Berkeley County, and with such branch offices in the State of South Carolina as the directors may determine.

§ 58-31-20. Board of directors; advisory board.

Such Public Service Authority shall consist of a board of eleven directors to be appointed by the Governor with the advice and consent of the Senate as follows: One from each congressional district of the State; one from each of the counties of Horry, Berkeley and Georgetown and two shall be from the State at large, one of whom shall be chairman and the other of whom shall have had experience with the operations of rural electric cooperatives. Each director shall serve for a term of seven years and until his successor is appointed and qualifies, except that the present directors, including the chairman, shall serve until their terms of office expire and the directors first appointed from Horry, Berkeley and Georgetown Counties shall be appointed for terms of five, six and seven years respectively as determined by lot, such terms to commence May 19, 1974. At the expiration of the term or each director and of each succeeding director the Governor shall appoint with the advice and consent of the

Senate a successor, who shall hold office for a term of seven years, or until his successor has been appointed and qualified. In the event of a vacancy occurring in the office of a director by death, resignation or otherwise, the Governor shall appoint his successor, only with the advice and consent of the Senate and he shall hold office for the unexpired term. No director shall receive a salary for services as director until the Authority is in funds, but each director shall be paid his actual expense in the performance of his duties hereunder, the same to be advanced from the contingent fund of the Governor until such time as the Public Service Authority is in funds, at which time the contingent fund shall be reimbursed. After the Public Service Authority is in funds, the compensation and expenses of each member of the board shall be paid from such funds, and the same shall be fixed by the advisory board hereinafter established. Members of the board of directors may be removed for cause by the advisory board or a majority thereof. No member of the General Assembly of the State of South Carolina shall be eligible for appointment as director of the Public Service Authority during the term of his office. Not more than two members from the same county shall serve as directors at any time.

For the assistance of the board of directors of said Public Service Authority, there is hereby established an advisory board to be known as the advisory board of the South Carolina Public Service Authority, to be composed of the Governor of the State, the Attorney General, the State Treasurer, the Comptroller General and the Secretary of State, as ex officio members, who shall serve without extra compensation other than necessary traveling expenses. Said advisory board shall perform any duties imposed on them under this chapter, and shall consult and advise with the board of directors on any and all matters which by the board of directors may be referred to the advisory board. The board of directors shall make annual

reports to the advisory board, which reports shall be submitted to the General Assembly by the Governor, in which full information as to all of the acts of said board of directors shall be given, together with financial statement and full information as to the work of the Authority. The advisory board shall on July first of each year, designate some reputable certified public accountant or accountants, resident in the State for the purpose of making a complete audit of the affairs of said Authority, which said audit shall be filed with the annual report of the board of directors.

§ 58-31-30. Powers of Authority.

The Public Service Authority has power to develop the Cooper River, the Santee River, and the Congaree River in this State, as instrumentalities of intrastate, interstate, and foreign commerce and navigation; to produce, distribute, and sell electric power; to acquire, treat, distribute, and sell water at wholesale; to reclaim and drain swampy and flooded lands; and to reforest the watersheds of rivers in this State; and also has all powers which may be necessary or convenient for the exercise of these powers, including without limiting the generality of the foregoing, the following powers:

(1) To have perpetual succession as a corporation.

(2) To sue and be sued.

(3) To adopt, use and alter a corporate seal.

(4) To acquire, purchase, hold, use, lease, mortgage, sell, transfer, and dispose of any property, real, personal or mixed, or any interest therein.

(5) To divert water from the Tail Race Canal by means of canals, flumes, or otherwise and to build, construct, maintain, and operate canals, dams, locks, aqueducts, reservoirs, draw-spans, ditches, drains, and roads, and to lay and construct any tunnels, penstocks, culverts,

flumes, conduits, mains, and other pipes necessary or useful in connection therewith.

(6) To divert waters from the Santee River by means of a canal or canals, flume or flumes or otherwise, and to construct and maintain a dam of any height or size for the purpose of impounding said waters and to discharge the same into the Cooper River or otherwise.

(7) To build, acquire, construct and maintain power houses and any and all structures, ways and means, necessary, useful or customarily used and employed in the manufacture, generation and distribution of water power, steam electric power, hydroelectric power and any and all other kinds of power, including power transmission lines, poles, telephone lines, substations, transformers, and generally all things used or useful in the manufacture, distribution, purchase and sale of power generated by water, steam or otherwise.

(8) To manufacture, produce, generate, transmit, distribute and sell water power, steam electric power, hydroelectric power or mechanical power within and without the State of South Carolina.

(9) To reclaim and drain swampy and flooded lands.

(10) To reforest the watersheds of the Cooper, Santee and Congaree Rivers and to prevent soil erosion and floods.

(11) To make bylaws for the management and regulation of its affairs.

(12) To appoint officers, agents, employees and servants, to prescribe their duties, and to fix their compensation.

(13) To fix, alter, charge and collect tolls and other charges for the use of their facilities of, or for the services rendered by, or for any commodities furnished by, the Public Service Authority at rates to be determined by

it, such rates to be at least sufficient to provide for payment of all expenses of the Public Service Authority, the conservation, maintenance and operation of its facilities and properties, the payment of principal and interest on its notes, bonds and other evidences of indebtedness or obligation and to fulfill the terms and provisions of any agreements made with the purchasers or holders of any such notes, bonds or other evidences of indebtedness or obligation.

(14) From time to time to borrow money, make and issue negotiable notes, bonds and other evidences of indebtedness, including refunding and advanced refunding notes, bonds and other evidences of indebtedness, of the Public Service Authority; to secure the payment of such obligations or any part thereof by mortgage, lien, pledge, or deed of trust, on all or any of its property, contracts, franchises or revenues, including the proceeds of any such refunding and advanced refunding notes, bonds and other evidences of indebtedness and the investments in which such proceeds are invested and the earning on and income therefrom; to invest its moneys, including without limitation its revenues and the proceeds of such notes, bonds, or other evidences of indebtedness, in obligations of, or obligations the principal of and interest on which are guaranteed by or are fully secured by contracts with, the United States of America, in obligations of any agency, instrumentality or corporation which has been or may hereafter be created by or pursuant to an act of Congress of the United States as an agency, instrumentality or corporation thereof, in direct and general obligations of the State of South Carolina, and in certificates of deposit issued by any bank, trust company or national banking association; provided, however, that the Authority, when investing in certificates of deposit, shall invest in certificates of deposit issued by institutions authorized to do busines in South Carolina if such institutions offer terms which, in the opinion of the Authority, are equal to

or better than those offered by other institutions; to make such agreements with the purchasers or holders of such notes, bonds or other evidences of indebtedness or with others in connection with any such notes, bonds or other evidences of indebtedness, whether issued or to be issued, as the Public Service Authority shall deem advisable; and in general to provide for the security for said notes, bonds or other evidences of indebtedness and the rights of the holders thereof; provided, that in the exercise of the powers herein granted to issue advanced refunding notes, bonds or other evidences of indebtedness of Public Service Authority, may, but shall not be required to avail itself of or comply with any of the provisions of the Advanced Refunding Act, §§ 11-21-10 to 11-21-80.

(15) To endorse or otherwise guarantee the obligations of any corporation all of the voting stock of which the Public Service Authority may own or acquire.

(16) Without limitation of the foregoing to borrow money from the United States Government or any corporation or agency created, designed or established by the United States.

(17) To make contracts of every name and nature and to sue and be sued thereon; to enter into agreements providing for binding arbitration between the parties thereto; and to execute all instruments necessary or convenient for the carrying on of its business.

(18) To have power of eminent domain.

(19) To mortgage, pledge, hypothecate or otherwise encumber all or any of the property, real, personal, or mixed, or facilities, or revenues of the Public Service Authority as security for notes, bonds, evidences of indebtedness or other obligations of the Public Service Authority.

(20) To do all acts and things necessary or convenient to carry out the powers granted to it by this chapter or any other law.

(21) To investigate, study and consider all undeveloped power sites and navigation projects in the State and to acquire or develop the same as need may arise in the same manner as herein provided. Provided, always, nevertheless, that said investigations, studies and considerations of said South Carolina Public Service Authority herein created shall be limited to the Congaree River and its tributaries below the confluence of the Broad and Saluda Rivers and the Wateree tributary of the Santee River at and near a point at or near Camden, South Carolina. Provided, however, that the Public Service Authority shall have no power at any time or in any manner to pledge the credit and the taxing power of the State or any of its political subdivisions, nor shall any of its obligations or securities be deemed to be obligations of the State or of any of its political subdivisions; nor shall the State be legally, equitably or morally liable for the payment of principal of and interest on such obligations or securities. The State of South Carolina does hereby pledge to and agree with any person, firm or corporation, the government of the United States and any corporation or agency created, designated or established by the United States, subscribing to or acquiring the notes, bonds, evidences of indebtedness or other obligations to be issued by the Public Service Authority for the construction of any project, that the State will not alter or limit the rights hereby vested in the Public Service Authority until the said notes, bonds, evidences of indebtedness or other obligations, together with the interest thereon, are fully met and discharged; provided, that nothing herein contained shall preclude such limitation or alteration if and when and after adequate provisions shall be made by law for the protection of those subscribing to or acquiring such notes, bonds, evidences of indebtedness or other obligations of the Public Service Authority. The State of South Carolina or any political subdivision shall in no way be responsible for any debts or obligations contracted by or for the Authority, and the board or directors of the Au-

thority, the advisory board, and the officers shall make no debt whatsoever for the payment of which the State or any political subdivision shall in any way be bound. It is intended that the project to be developed hereunder and any and all projects undertaken by the provisions of this chapter, shall be financed as self-liquidating projects and that the credit and taxing powers of the State, or its political subdivisions shall never be pledged to pay said debts and obligations.

(22) To acquire or purchase, if requested to do so, or to construct, operate, and maintain all structures and facilities necessary, useful, or customarily used and employed in the treatment and distribution of water for industrial, commercial, domestic, or agricultural purposes within the counties of Berkeley, Charleston, Clarendon, Dorchester, Orangeburg, and Sumter. The provisions of this section do not apply to the acquisition or purchase of existing electric systems.

(23) To acquire, treat, transmit, distribute, and sell water at wholesale within the counties of Berkeley, Charleston, Clarendon, Dorchester, Orangeburg, and Sumter if requested in writing to do so by the governing body of any incorporated municipality, by the governing body of any special purpose district providing water service in the unincorporated areas of each county, or by the governing body of each county for those unincorporated areas not so provided water service by a special purpose district. The authority may not transfer water from one river basin to another. However, the authority shall prepare and maintain its books and records for its water supply operations separate and apart from its books and records for the generation, transmission, and distribution of electric power. The costs of water supply operations, including the loss of the generation of hydroelectric power, may not affect rates and charges for electric service. Water must be offered for sale by the authority on a nondiscriminatory basis without regard to whether elec-

tricity is also purchased from the authority. Without limiting the generality of the foregoing, the Public Service Authority shall have power and is hereby authorized from time to time to issue its negotiable bonds and to secure the payment of the same by mortgage, lien, pledge, or deed of trust, on or of all or any of its property, contracts, franchises or revenues. Said bonds shall be authorized by resolution of the board of directors and shall bear such date or dates, be in such forms, and contain such provisions, as the board of directors may determine. Any resolution or resolutions authorizing any notes, bonds, or other evidences of indebtedness may contain provisions, which shall be a part of the contract with the holders thereof, as to (a) the rates of tolls and other charges for use of the facilities of, or for the services rendered by, or for the commodities furnished by, the Public Service Authority, (b) the setting aside of reserves or sinking funds and the regulation and disposition thereof, (c) reserving the right to redeem the notes, bonds, or other evidences of indebtedness at such prices, not exceeding one hundred five per cent of the principal amount thereof and accrued interest, as may be provided, (d) limitations on the issuance of additional bonds, (e) the terms and provisions of any mortgage or deed of trust securing the bonds or under which the same may be issued and (f) any other or additional agreements with the holders of such notes, bonds or other evidences of indebtedness.

The Public Service Authority may enter into any mortgages, deeds of trust or other agreements with any bank or trust company or other person or persons in the United States having power to enter into the same, including the United States Government or any agency or creature thereof, as security for the notes, bonds or other evidences of indebtedness and may transfer, convey, mortgage or pledge all or any of the property, contracts, franchises or revenues of the Public Service Authority thereunder. Such mortgage, deed of trust or other agreement may contain such provisions as may be customary in such

instruments or as the Public Service Authority may authorize, including (but without limitation) provisions as to (a) the construction, operation, maintenance and repair of the properties or facilities of the Public Service Authority, (b) the application of funds and the safeguarding of funds on hand or on deposit, (c) the rights and remedies of said trustee and the holders of the bonds, (d) possession of the mortgaged properties and (e) the terms and provisions of the bonds, and may also provide for a franchise for operation of the property and business of the Public Service Authority, or any part thereof, to any person, firm or corporation, including the United States Government, or any agency thereof, acquiring the mortgaged property or any part thereof upon foreclosure for a period of not to exceed twenty years from the date of such acquisition.

The powers herein conferred upon the board of directors shall not be construed to give the board of directors the power to sell, except by way of mortgage or deed of trust, all of the physical property of the Authority, but the board of directors may sell any surplus property which it may acquire and which said board of directors shall deem not to be necessary for the purpose of the development.

§ 58-31-40. Remedies upon default of obligations; appointment of receiver.

Any resolution authorizing any notes, bonds or other evidences of indebtedness, and any mortgage or trust indenture or other agreement entered into pursuant thereto, may, whether or not any such obligations are or are to be secured by mortgage, provide that in the event that (a) default shall be made in the payment of the interest on any or all such obligations when and as the same shall become due and payable, (b) default shall be made in the payment of the principal of any or all such obligations when and as the same shall become due and payable, whether at the maturity thereof, by call for redemption or otherwise or (c) default shall be

made in the performance of any agreement made with the purchasers or successive holders of any such obligations, and such default shall have continued for such period, if any, as may be prescribed by said resolution or said mortgage, trust indenture or other agreement in respect thereof, the trustees under such mortgage, trust indenture or other agreement entered into in respect of the obligations authorized thereby (or, if there shall be no such mortgage, trust indenture or other agreement, or trustee thereunder, a trustee appointed in the manner provided in such resolution or resolutions by the holders of not less than twenty-five per centum in aggregate principal amount of the obligations authorized thereby and at the time outstanding) may, and upon the written request of the holders of twenty-five per centum in aggregate principal amount of the obligations authorized by such resolution or resolutions at the time outstanding, shall, in his or its own name, but for the equal and proportionate benefit of the holders of all of such obligations, and with or without having possession thereof:

(1) By mandamus or other suit, action or proceeding at law or in equity, enforce all rights of the holders of such obligations;

(2) Bring suit upon such obligations, the coupons appurtenant thereto, or both;

(3) By action or suit in equity, require the Authority to account as if it were the trustee of an express trust for the holders of such obligations;

(4) By action or suit in equity, enjoin any acts or things which may be unlawful or in violation of the rights of the holders of such obligations;

(5) After such notice to the Authority as such resolution may provide, declare the principal of all such obligations due and payable, and if all defaults shall have been made good, then with the written consent of the holder or holders of twenty-five per centum in aggregate principal amount of such obligations at the time outstanding, annul such declaration and its consequences;

Provided, however, that the holders of a majority in principal amount of such obligations at the time outstanding shall, by instrument or instruments in writing delivered to such trustee, have the right to direct and control any and all action taken or to be taken by such trustee under this section. Any such resolution, mortgage, indenture or agreement may likewise provide that in any such suit, action or proceeding, any such trustee, whether or not all of such obligations have been declared due and payable, and with or without possession of any thereof, shall be entitled as of right to the appointment of a receiver who may enter upon and take possession of all or any part of the properties of the Authority and operate and maintain the same, and fix, collect and receive rates, tolls, and charges sufficient to provide revenues to pay the items specified in clause 13 of § 58-31-30 hereof and all costs and disbursements of such suit, action or proceeding, such revenues to be applied in conformity with the provisions of this chapter and the resolution or resolutions authorizing such obligations, or the mortgage, indenture or other agreement pursuant to which the same shall have been issued. In any suit, action or proceeding by any such trustee, the reasonable fees, counsel fees and expenses of such trustee and of the receiver or receivers, if any, shall constitute taxable disbursements, and all costs and disbursements allowed by the court shall be a first charge upon any revenues pledged to secure the payment of such obligations. The circuit court of the county of Richland, and the circuit court of any other county wherein is located the principal office or any branch office of the Authority or wherein any of its property or facilities may be located, or any of such courts, shall have jurisdiction of any such suit, action or proceeding by any such trustee, and of all property involved therein. In addition to the powers hereinafter specifically provided for, each such trustee shall have and possess all powers necessary or appropriate for the exercise of any thereof, or necessary or appropriate for the general representation

of the holders of such obligations in the enforcement of their right or rights.

None of the remedies provided for in this section shall be deemed to be exclusive, and any one or more than one or all thereof shall be available in connection with any default and with any subsequent default.

§ 58-31-50. Right to and procedure for acquisition of property by Authority.

The Public Service Authority may acquire by purchase, gift, condemnation, or in any other manner, any lands, waters, water rights, riparian rights, flowage rights, easements, licenses, franchises, engineering data, construction plans, or estimates prepared for the development of the Cooper River and Santee River or any other real or personal property necessary or useful in carrying out any of its purposes or exercising any of its powers; but before the board of directors may acquire and pay for, without condemnation any plans, specifications, franchises, or any kind of property, belonging to or to belong to any private corporation previously chartered by this State or any other state for the purpose of developing the Santee-Cooper project, a full report of the proposed purchase must be submitted in writing to the advisory board, which shall order a public hearing on the proposed purchase and due notice of the hearing must be given by advertisement to be published in at least three daily papers published in the State twice each week for two consecutive weeks. The advisory board shall carefully investigate the proposed purchase, and shall file its report in writing with the Secretary of State and the board of directors of the Public Service Authority. If the report recommends a price for the proposed purchase, the board of directors may enter into a contract for the purchase; if the report disapproves the proposed purchase, the board of directors may submit any amended proposed agreement, which must be heard by the advisory board in the same manner, or shall pro-

ceed with condemnation; the price to be paid to any private corporation for any of its property is subject to the approval of the original purchaser of the first notes, bonds, or other evidence of indebtedness issued under this chapter. The Public Service Authority shall have the right of eminent domain to carry out the purposes of this chapter.

§ 58-31-60. Duties and powers of board of directors.

The powers of the Public Service Authority shall be exercised by the board of directors, with the exception of such duties as this chapter shall impose upon the advisory board. A majority of the members of the board of directors shall constitute a quorum of the board for the purpose of organizing the Public Service Authority and conducting the business thereof and for all other purposes and all action may be taken by vote of a majority of directors present unless in any case the bylaws shall require a larger number. The board of directors shall have full authority to manage the property and business of the Public Service Authority, and to prescribe, amend and repeal bylaws, rules and regulations governing the manner in which the general business of the Public Service Authority may be conducted and the powers granted to it may be exercised and embodied. The board of directors shall fix and determine the number of officers, agents, employees and servants of the Public Service Authority and their respective compensation and duties, and may delegate to one or more of their number, or to one or more of such officers, agents, employees or servants, such powers and duties as it may deem proper. Each director shall give bond for the faithful performance of his duties as such director in the penal sum of at least ten thousand dollars, the premium for the first bonds to be paid by the Governor from his contingent fund to be reimbursed when the Authority is in funds, and all subsequent premiums to be paid from funds of the Authority. The board of directors shall require similar bonds in such amounts as

they may determine from any or all officers, agents and employees in position of responsibility or trust. The position of director of the Public Service Authority is not a public office, and the State shall in no wise be responsible for the acts of the directors, but each director and his surety and the Public Service Authority shall be responsible for all acts of the director in connection with the functions herein provided for. Forthwith upon the appointment and organization of the Public Service Authority it shall proceed with the improvement and development of the Cooper River, the Santee River, the Congaree River and their tributaries upstream to the confluence of the Broad and Saluda Rivers and upstream on the Wateree River to a point at or near Camden for the aid and benefit of commerce and navigation, flood control and drainage, and for the development of the hydroelectric power inherent therein. The Authority shall investigate other power and navigation projects in the State and shall have power to acquire or develop desirable ones as early as practicable.

§ 58-31-70. Use of facilities and operation of business of Authority.

The use of the facilities of the Public Service Authority and the operation of its business shall be subject to the rules and regulations from time to time adopted by the Public Service Authority; provided, however, that the Public Service Authority shall not be authorized to do anything which will impair the security of the holders of the notes, bonds or other evidences of indebtedness of the Public Service Authority or violate any agreement with them or for their benefit.

§ 58-31-80. Purpose of Authority; exemption from taxation; Authority shall make certain payments in lieu of taxes.

The Public Service Authority is created primarily for the purpose of developing the Cooper River, the Santee River, the Congaree River, and their tributaries up-

stream to the confluence of the Broad and Saluda Rivers and upstream on the Wateree River to a point at or near Camden and other similar projects as instrumentalities of intrastate, interstate, and foreign commerce and navigation; of reclaiming wastelands by the elimination or control of flood waters, reforesting the watersheds of the rivers and improving public health conditions in those areas. It is found that the project authorized by this chapter is for the aid of intrastate, interstate, and foreign commerce and navigation, and that the aid and improvement of intrastate, interstate, and foreign commerce and navigation, the development, sale, and distribution of hydroelectric power, and the treatment, sale, and distribution of water at wholesale are in all respects for the benefit of all the people of the State, for the improvement of their health and welfare and material prosperity, and are public purposes, and being a corporation owned completely by the people of the State, the Public Service Authority is required to pay no taxes or assessments upon any of the property acquired by it for this project or upon its activities in the operation and maintenance of the project, except as provided in this section. The securities and other obligations issued by the Public Service Authority, their transfer and the income from them at all times are free from taxation. However, unless otherwise provided in any contract with an agency of the United States Government as assists in financing the projects contemplated in this section or any other agency from which the funds may be secured, all electrical energy developed by the authority must be sold at rates in the determination of which the taxes which the project would pay if privately owned, to the extent provided in this section, as well as other rate-making factors properly entering into the manufacture and distribution of the energy must be considered. After payment of necessary operating expenses and all annual debt requirements on bonds, notes, or other obligations at any time outstanding and the discharge of all annual obliga-

tions arising under finance agreements with the United States or any agency or corporation of the United States and indentures or other instruments under which bonds have been, or may be issued, the authority shall pay annually to the various counties of the State a sum of money equivalent to the amount paid for taxes on properties at the time of their acquisition by the authority, acquired, or to be acquired, in the counties, and the authority shall pay to all municipalities and school districts in the counties in which the authority has acquired, or may acquire properties, a sum of money equivalent to the amount paid for taxes to the school districts and municipalities on the properties at the time of their acquisition by the authority; and no other taxes may be considered in the fixing of the rates of the authority. From the funds to be paid under this section the counties, school districts, and municipalities annually shall apply a sum sufficient for the debt requirements for bonds and other obligations of the counties, school districts, and municipalities for which the properties were taxed at the time of their acquisition by the authority, with the remainder of the funds to be expended in accordance with law.

§ 58-31-90. Payments in lieu of taxes to certain counties and school districts.

Beginning with the tax year 1965, after the payment of all necessary operating expenses and all annual debt requirements on bonds, notes or other obligations at any time outstanding and the discharge of all obligations arising under finance agreements and indentures or other instruments under which bonds or obligations have been or may be issued, and after payment into the general fund of the State the sum of at least two hundred twenty-five thousand dollars annually, the South Carolina Public Service Authority shall pay annually to the counties of Orangeburg, Calhoun, Sumter, Clarendon, Berkeley, Horry and Georgetown and school districts therein addi-

tional sums of money in lieu of taxes on lands acquired prior to the year 1950 for reservoirs, lakes, canals, structures and adjoining properties of the Santee-Cooper Hydroelectric and Navigation Project in amounts equivalent to that paid in 1964 for sums in lieu of taxes on such lands to the counties and school districts therein. Provided, that all additional sums to be paid under this section shall be used for the support of the public schools within the counties and districts involved.

§ 58-31-100. Payment of additional sums in lieu of taxes.

Beginning with the fiscal year 1974-75 and in each fiscal year thereafter, after payment of the sums in lieu of taxes provided for by §§ 58-31-80 and 58-31-90, the Public Service Authority shall make the following additional payments in lieu of taxes:

(1) To any county in which it holds legal title to lands developed for commercial or residential purposes, a sum equal to ten percent of the annual rentals received from the lease of those lands during the fiscal year. (2) To the counties in which it owns, or leases and operates, electric generating facilities, a sum equal to fifteen percent of the amount paid in the fiscal year into the General Fund of the State, which sum shall be allocated among the counties concerned in the proportion which the generating capacity of the Public Service Authority located and in operation in each such county bears to the total of the Public Service Authority's generating capacity located and in operation in all such counties.

(3) To the counties of Berkeley, Horry and Georgetown, a sum equal to ten percent of the amount paid during the fiscal year into the General Fund of the State, which sum shall be allocated among those counties in the proportion which the kilowatt hour sales, excluding sales for resale, made by the Public Service Authority in each such county bears to the total of the kilowatt hour sales,

excluding sales for resale, made by the Public Service Authority in all such counties.

§ 58-31-110. Net earnings; disposition and use thereof.

The South Carolina Public Service Authority is a corporation, completely owned by and to be operated for the benefit of the people of this State, and any and all net earnings thereof not necessary or desirable for the prudent conduct and operation of its business or to pay the principal of and interest on its bonds, notes or other evidences of indebtedness or other obligations or to fulfill the terms and provisions of any agreements made with the purchasers or holders thereof or others shall be paid over semiannually to the State Treasurer for the general funds of the State and shall be used to reduce the tax burdens on the people of this State.

§ 58-31-120. Authority shall use labor and materials from the State.

As far as may be practicable and not in conflict with any statute of the United States or the rules or regulations of any agency thereof which may assist in financing any project undertaken pursuant to this chapter, the Public Service Authority shall use and give preference to South Carolina workmen and South Carolina materials. As far as may be practicable, and not to conflict with any rules of the United States Government or any agency thereof which may assist in financing the development herein proposed, the Public Service Authority shall use South Carolina materials and shall make purchases within the State where possible. As far as may be practicable, the labor to be employed on the development herein provided for shall be resident South Carolina workmen, and the same shall be allocated to each county in the State ratably, as the need for employment may exist, and, as far as may be practicable, as reflected by the rolls of the unemployed in the various public employment offices in each county in South Carolina.

§ 58-31-130. Credit and taxing power of the State and its subdivisions shall not be involved; liability for payment of securities.

Nothing contained in the provisions of this chapter shall, at any time or in any manner, involve the credit and taxing power of the State, or of any of its political subdivisions; nor shall any of the securities or other evidences of indebtedness authorized to be issued in and by this chapter ever be or constitute obligations of the State or of any of its political subdivisions; nor shall the State or any of its political subdivisions ever be liable or responsible, in any way, for the payment of the principal or interest of or on such security or other evidences of indebtedness.

§ 58-31-140. State and its subdivisions shall never levy taxes or appropriate funds for project.

It is hereby declared that the State and any of its political subdivisions shall never levy any tax to pay any obligations incurred in building this project or make any appropriation to carry on the work of developing the Santee-Cooper power project.

§ 58-31-150. Amendments or repeal of chapter; effect.

The right to alter, amend, or repeal this chapter is hereby expressly reserved and disclosed, but no such amendment or repeal shall operate to impair the obligation of any contract made by said corporation under any power conferred by this chapter.

§ 58-31-160. Authority may construct Santee-Cooper project.

The Public Service Authority may construct the Santee-Cooper hydroelectric and navigation project as outlined and described in the license issued by the Federal Power Commission to Columbia Railway and Navigation Company for the construction of project No. S. C. 199, dated

April 2, 1926 and amended February 14, 1927, May 31, 1933 and May 13, 1937, and on license drawings prepared and filed with said Commission at the time of the issuance of said license and said amendments and thereafter as required by the terms and provisions of said license and the amendatory plans and drawings filed or to be filed by the Public Service Authority with said Commission and approved or to be approved by said Commission or as outlined and described in any new license or licenses that the Authority may obtain from said Commission under the terms of this chapter.

§ 58-31-170. Designation of Lake Moultrie and Lake Marion.

One of the lakes belonging to the State, constructed by the South Carolina Public Service Authority on the Cooper River near Pinopolis, in Berkeley County, shall hereafter be known as Lake Moultrie, and the other lake belonging to the State, constructed by the Authority on the Cooper River in the same area, shall be known as Lake Marion.

§ 58-31-180. Diversion of water from Sampit River, Penney Royal Creek and their tributaries for use in operation of generating plant.

(1) The South Carolina Public Service Authority is hereby authorized to divert water from the Sampit River, Penney Royal Creek and their tributaries for use in connection with the operation of an electric generating plant to be constructed in Georgetown County between the Sampit River, Penney Royal Creek and Winyah Bay and to discharge such water, or so much thereof as is not consumed, into Winyah Bay. Such diversion shall not exceed two thousand cubic feet of water per second each day, and may be accomplished by canals, conduits, ditches, pipes or other proper structures.

(2) Nothing contained in this section shall be construed to waive the public law or regulations of the State of South Carolina as to pollution control. (3) This section shall not affect the right of any person to recover, in a court of competent jurisdiction, damages sustained as a result of the diversion of water permitted by this section.

§ 58-31-190. Diversion of water from Santee River and its tributaries for use in operation of generating plant.

The South Carolina Public Service Authority is hereby authorized to divert water from the Santee River, and its tributaries for use in connection with the operation of an electric generating plant to be constructed in Georgetown County between the Sampit River, Penney Royal Creek and Winyah Bay and to discharge such water, or so much thereof as is not consumed into Turkey Creek, and thereto Penney Royal Creek and thereto into Sampit River. Such diversion shall not exceed one hundred cubic feet of water per second each day, and shall be accomplished by pipes or other underground structures. Such diversion shall not in any manner reduce the water level or flow rate of the Santee River and its tributaries.

Nothing contained in this section shall be construed to waive the public law or regulations of the State of South Carolina as to pollution control. This section shall not affect the right of any person to recover, in a court of competent jurisdiction, damages sustained as a result of the diversion of water permitted by this section.

§ 58-31-200. Joint ownership of nuclear electric generating station in Fairfield County.

The South Carolina Public Service Authority shall have the power to become a joint owner with South Carolina Electric and Gas Company of a proposed nuclear electric generating station, and related transmission facilities, to be constructed on a site at or near Parr Shoals in Fairfield County and specifically the power to plan,

finance, acquire, own, operate and maintain an undivided interest in such plant and facilities necessary or incidental to the generation and transmission of electric power generated at the plant, and to make such plans and enter into such contracts as are necessary or convenient for the planning, financing, acquisition, construction, ownership, operation and maintenance of the plant and facilities; provided, however, that the Public Service Authority shall own a percentage of the plant and facilities equal to the percentage of the money furnished or the value of property supplied by it for the acquisition and construction of the plant and facilities and shall own and control a like percentage of the electrical output thereof; provided, further, that the Public Service Authority shall be severally liable, in proportion to its ownership share of the plant and facilities, for the acts, omissions or obligations performed, omitted or incurred by South Carolina Electric and Gas Company while acting as the designated agent of the Public Service Authority for purposes of constructing, operating or maintaining the plant and facilities or any of them, but shall not otherwise be liable, jointly or severally, for the acts, omissions or obligations of South Carolina Electric and Gas Company; nor shall any money or property of the Public Service Authority be credited or otherwise applied to the account of South Carolina Electric and Gas Company, or be charged with any debt, lien or mortgage as a result of any debt or obligation of South Carolina Electric and Gas Company.

§ 58-31-210. Public Service Authority empowered to enter joint ownership of electric generation and transmission facilities with Central Electric Power Cooperative.

The South Carolina Public Service Authority shall have the power to become a joint owner with Central Electric Power Cooperative, Inc., of electric generation and transmission facilities, the power to plan, finance, acquire, own, operate and maintain an undivided interest in such plants and facilities necessary or incidental to the genera-

tion and transmission of electric power and the power to make plans and enter into such contracts as are necessary or convenient for the planning, financing, acquisition, construction, ownership, operation and maintenance of such plants and facilities; provided, however, that the Public Service Authority shall own a percentage of such plants and facilities equal to the percentage of the money furnished or the value of property supplied by it for the acquisition and construction of the plants and facilities and shall own and control a like percentage of the electrical output thereof; provided, further, that the Public Service Authority shall be severally liable in proportion to its ownership share of such plants and facilities for the acts, omissions or obligations performed, omitted or incurred by Central Electric Power Cooperative, Inc., while acting as the designated agent of the Public Service Authority for purposes of constructing, operating or maintaining the plants and facilities or any of them, but shall not otherwise be liable, jointly or severally, for the acts, omissions or obligations of Central Electric Power Cooperative, Inc.; nor shall any money or property of the Public Service Authority be credited or otherwise applied to the account of Central Electric Power Cooperative, Inc., or be charged with any debt, lien or mortgage as a result of any debt or obligation of Central Electric Power Cooperative, Inc. Nothing in this section shall be construed to prevent the Public Service Authority from leasing facilities or interests therein from Central Electric Power Cooperative, Inc., and incurring obligations under such leases.

§ 58-31-220. Authorization for Public Service Authority to adopt calendar year as its fiscal year.

The Public Service Authority may adopt the calendar year as its fiscal year, but the adoption does not affect payments made by the Authority to the general fund of the State.

ARTICLE 3. PROVIDING ELECTRIC SERVICE

§ 58-31-310. Definitions.

The following words and phrases as used in this article, unless a different meaning is plainly required by the context, shall have the following meanings:

(1) The term "electrical utility" includes persons and corporations, their lessees, assignees, trustees, receivers or other successors in interest owning or operating in this State equipment or facilities for generating, transmitting, delivering or furnishing electricity for street, railway or other public uses or for production of light, heat or power to or for the public for compensation; but it shall not include an electric cooperative or municipality and shall not include a person, corporation furnishing electricity only to himself or itself, their residents, employees or tenants when such electricity is not resold or used by others.

(2) The term "present service area" means the area or areas hereinafter described, within which the Public Service Authority shall have the right to furnish electrical service to the exclusion of other electrical utilities.

(3) The term "premises" means the building, structure or facility including any expansions or additions thereto, to which electricity is being or is to be furnished; provided, that two or more buildings, structures or facilities which are located on one tract or contiguous tracts of land and are utilized by one electric consumer for farming, business, commercial, industrial, institutional or governmental purposes, shall together constitute one "premises" regardless of whether they are separately metered and the charges for such service are calculated independently of charges for service to any other building, structure or facility.

Premises are considered as being served by the Public Service Authority if on July 9, 1973 a contract between

the electric consumer and the Public Service Authority has been signed, or any of the facilities for electric service belonging to the Public Service Authority are attached to such premises.

(4) The term "line" means any electric conductors operating at a nominal voltage level of 25 KV or less, measured phase-to-phase, except (a) in the case of overhead construction, conductors from the pole or tower nearest the premises of a consumer to the premises, or conductors from a line tap to the premises, and (b) in the case of underground construction, conductors from the transformer (or junction point, if there is one) nearest, on or in the premises of the consumer to the premises. The term "line" includes any electric conductor operating at a nominal voltage level in excess of 25 KV when it is agreed between the Public Service Authority and an affected electric cooperative serving in the county where the conductor is located that the primary purpose and use of the conductor on January 1, 1984, was for the distribution of electric power and not for the transmission of bulk power from one area to another.

§ 58-31-320. Customers to whom Authority shall provide electric service.

After July 9, 1973 the Public Service Authority shall have the right to provide electric service only to, and it shall have the right to serve:

(1) Central Electric Power Cooperative, Inc., including (a) all electric cooperatives that are members of Central Electric Power Cooperative, Inc., on July 9, 1973, (b) any electric cooperative which after July 9, 1973 becomes a member of Central Electric Power Cooperative, Inc., (c) any electric cooperative which after July 9, 1973 ceases to be a member of Central Electric Power Cooperative, Inc., and (d) in the event Central Electric Power Cooperative, Inc., ceases to exist as a corporate

entity, any electric cooperative which was a member of Central Electric Power Cooperative, Inc., at the time of its dissolution.

(2) All premises, customers and electric cooperatives served by it on July 9, 1973;

(3) Its present service area as defined in § 58-31-330;

(4) Those areas owned, leased or controlled by the Public Service Authority adjacent to the lakes and waterways of Federal Power Commission Project No. 199.

If, after July 9, 1973, any customers, premises or electric cooperatives located outside the present service area of the Public Service Authority as defined in § 58-31-330 and being served by the Public Service Authority, including any subsequent expansions or additions by such customers, premises or cooperatives, ceases or discontinues accepting electrical service from the Public Service Authority, the Public Service Authority may subsequently sell and furnish electrical service to new customers, premises or electric cooperatives from its major transmission lines in an amount not exceeding the amount of power the sale of which was lost by reason of such discontinuation of service.

Nothing contained herein shall be construed to restrict the right of the Public Service Authority to furnish electric service to its own premises; to exchange or interchange electric service with, purchase electric energy from or sell electric energy to any other electrical utility; to construct additional facilities, within or without its present service area, as defined in § 58-31-330; to construct additional delivery points to or for any of the premises or customers it is authorized to serve as provided for in this section; or to fulfill the growth needs of any customer legally served by it.

§ 58-31-330. Service area of Authority.

Except as set forth in this article, the present service area of the Public Service Authority consists of the counties of Berkeley, Georgetown, and Horry; but the following described areas are not included in the Public Service Authority's present service area as defined herein:

(1) That portion of Berkeley County now being served by South Carolina Electric and Gas Company as indicated by crosshatching on Authority Drawing No. E-1851, entitled "Map of Berkeley County Showing Crosshatched Area being served by S.C.E. & G." and that portion of Berkeley County served by Berkeley Electric Cooperative, Inc., as the service area of Berkeley Electric Cooperative, Inc., is shown on Authority Drawing No. 5032-E08-0047 entitled "Map of Berkeley County showing Designated Areas Served by South Carolina Public Service Authority and Berkeley Electric Cooperative". (2) That portion of Georgetown County now being served by Carolina Power and Light Company, as indicated by crosshatching on Authority Drawing No. E-1850, entitled "Map of Georgetown County Showing Crosshatched Area being served by C. P. & L. Co." and that portion of Georgetown County served by Santee Electric Cooperative, Inc., as the service area of Santee Electric Cooperative, Inc., is shown on Authority Drawing No. 5032-E08-0046 entitled "Map of Georgetown County Showing Designated Areas Served by South Carolina Public Service Authority and Santee Electric Cooperative, Inc.". (3) That portion of Horry County now being served by Carolina Power and Light Company as indicated by crosshatching on Authority Drawing No. E-1849, entitled "Map of Horry County Showing Crosshatched Area being served by C. P. & L. Co." and that portion of Horry County served by Horry Electric Cooperative, Inc., as the service area of Horry Electric Cooperative, Inc., is shown on Authority Drawing No. 5032-E08-0048 entitled "Map of Horry County Showing Designated Areas

served by South Carolina Public Service Authority and Horry Electric Cooperative, Inc.".

The above described drawings, and all explanatory notes, symbols, and legends thereon, as approved by the General Manager of the Public Service Authority or his designee and the President of the electrical utility or electric cooperative involved or his designee, are made a part of this article by reference, and must be filed, safeguarded, and maintained as provided in § 58-31-340.

§ 58-31-340. Filing and correcting drawings; acquisition of facilities outside service area.

Each of the drawings referred to in § 58-31-330 must be filed in the place provided by law for recording the real estate records of the county concerned, and a certified copy of each drawing must be filed in the office of the Secretary of State. Certified copies of the drawing must be kept available for examination by the public in the principal office of the Public Service Authority, and must be furnished to the electrical utility or electric cooperative concerned.

Inaccuracies in the drawings discovered after certification and filing must be corrected by preparing revised drawings and approving and filing the revised drawings in the same manner as provided for original drawings. Nothing contained in §§ 58-31-310 through 58-31-370 may be construed to prevent the Public Service Authority from acquiring, by purchase, the electric facilities, or any part of them, owned by another electrical utility and located in any of the crosshatched areas described in § 58-31-330. The areas served by facilities purchased by the Public Service Authority shall become a part of the present service area of the Public Service Authority and must be evidenced by revised drawings approved and filed as provided in this section.

§ 58-31-350. Acquisition of facilities within service area.

Distribution facilities belonging to another electrical utility which, after July 9, 1973, are located in the present service area of the Public Service Authority as defined in § 58-31-330, shall be acquired by the Public Service Authority within two years of July 9, 1973 and upon payment to the electrical utility concerned of just compensation therefor. Pending the acquisition of such facilities by the Public Service Authority, electrical service shall continue to be furnished by the electrical utility owning the facilities. For the purposes of this section, "just compensation" shall consist of the total of the following:

(a) Reproduction cost, new, of the facilities being acquired, less depreciation on a straight line basis;

(b) Cost of reintegrating the system of the selling electrical utility after detaching the portion to be sold including allowance for idle substation capacity caused in the remaining portion of the system.

Just compensation shall otherwise be determined as provided in § 58-27-1360.

§ 58-31-360. State covenant with holders of obligations of Authority.

In order to protect those subscribing to, purchasing or acquiring the notes, bonds, evidences of indebtedness or other obligations of the Public Service Authority, the State of South Carolina does hereby covenant and agree with any person, firm or corporation, the government of the United States of America, and any corporation or agency created, designated or established by the United States, subscribing to, purchasing or acquiring the notes, bonds, evidences of indebtedness or other obligations heretofore or hereafter issued or incurred by the Public Service Authority for any authorized purpose, that the State will not alter, limit or restrict the power of the Public Service Authority to, and the Authority shall, fix, estab-

lish, maintain and collect rents, tolls, rates and charges for the use of the facilities of or for the services rendered or for any commodities furnished by the Public Service Authority, at least sufficient to provide for payment of all expenses of the Public Service Authority, the conservation, maintenance and operation of its facilities and properties and the payment of the principal of and interest on its notes, bonds, evidences of indebtedness or other obligations, and to fulfill the terms and provisions of any agreements made with the purchasers or holders of any such notes, bonds, evidences of indebtedness or obligations heretofore or hereafter issued or incurred. Provided, however, that prior to putting into effect any increase in rates the Public Service Authority shall give at least sixty days' notice of such increase to all customers who will be affected by the increase.

§ 58-31-370. Jurisdiction of circuit court.

The circuit court of this State shall have exclusive jurisdiction to hear and determine any dispute arising under §§ 58-31-310 through 58-31-360.

§ 58-31-380. Annual report of Authority as to rates.

The Public Service Authority shall annually report to the Public Service Commission in the same manner as electric cooperatives as to the rates charged by it.

§ 58-31-390. Authority not to service new premises assigned to electric cooperative; exception.

Except as provided in § 58-31-320(1), the Public Service Authority shall serve no new premises within the territory assigned by the Public Service Commission to any electric cooperative.

§ 58-31-400. Submission of annual budget.

The Public Service Authority shall submit its annual budget to the House Ways and Means Committee to be

printed as a regular part of the General Appropriation Act. The annual budget is submitted for information purposes only.

§ 58-31-420. Laws applicable to electric service within municipal limits not repealed or modified.

The authority granted in this article shall not repeal or modify other laws applicable to electric service within municipal corporate limits, and any provisions of this article inconsistent with other laws are not applicable within the municipal limits.

§ 58-31-430. Service area to be exclusively served by Authority; reservations; agreements between suppliers.

The Public Service Commission may not assign any portion of the present service area of the Public Service Authority to any electrical utility or electric cooperative and this service area must be exclusively served by the Public Service Authority. Santee Electric Cooperative, Inc., Berkeley Electric Cooperative, Inc., and Horry Electric Cooperative, Inc. may serve those areas reserved to them as provided in § 58-31-330. The Public Service Commission is directed to conform the present assignment under § 58-27-620 to the mandates of this article. Nothing contained in this article may be construed as preventing the Public Service Commission from exercising its jurisdiction over electric cooperative service areas in the manner provided by law. Upon customer choice either the Public Service Authority or an electric cooperative mentioned above may furnish electric service to any new premises which the other supplier has the right to serve pursuant to the provisions of this article, upon agreement of the affected suppliers.

§ 58-31-440. Maintenance of existing lines; customer choice in certain circumstances.

Lines of the Public Service Authority in existence on July 1, 1984, which extend into the service areas of Berkeley Electric Cooperative, Santee Electric Cooperative, and Horry Electric Cooperative, and lines of those cooperatives which extend into the service area of the Public Service Authority may continue to be operated and maintained by the owner of the lines, and premises served by the lines on July 1, 1984, must continue to be so served. The owner of a line in another supplier's service area may exclusively serve any new premises located wholly or partially within three hundred feet of the line. Where the premises are located wholly or partially within three hundred feet of a line of both the Public Service Authority and an electric Cooperative, the customer may choose between those suppliers, and the supplier originally chosen shall continue to have the exclusive right to serve such premises.

§ 58-31-450. Erosion control.

The Public Service Authority shall provide proper vegetation or other method of erosion control on any existing or future rights-of-way.

(2)

No. 91-1433

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1991

GREAT WESTERN COAL (KENTUCKY), INC.
and GREAT WESTERN COAL INC.,

Petitioners,

v.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY
and KENNETH R. FORD,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the South Carolina Public Service Authority, as an arm of the State of South Carolina, is subject to the district courts' jurisdiction over actions "between citizens of different States."[1]

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[1] Pursuant to Rule 29.1, respondents state that the South Carolina Public Service Authority is an agency and arm of the State of South Carolina. *See* S.C. Code §§ 58-31-10 to 58-31-450.

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and KENNETH R. FORD,

Respondents.

Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Respondents, the South Carolina Public Service Authority ("SCPSA") and Kenneth R. Ford, SCPSA's President and Chief Executive Officer, respectfully oppose the Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The unpublished *per curiam* order of the United States Court of Appeals for the Sixth Circuit in Case Nos.

91-5251/6052 appears in Appendix A of the Petition for a Writ of Certiorari, at 1a-2a.

The unpublished order, judgment, and memorandum opinion of the United States District Court for the Eastern District of Kentucky in Civil Action No. 90-246 appear in Appendices C, D, and E of the Petition, at 3a-10a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1). The court of appeals entered its judgment on December 9, 1991, and the Petition for a Writ of Certiorari was filed within 90 days thereafter. No petition for rehearing was filed.

STATUTES INVOLVED

The statutes involved are 28 U.S.C. § 1332, which is reproduced in Appendix E to the Petition, at 9a-10a, and S.C. Code §§ 58-31-10 to 58-31-450, reproduced in Appendix F to the Petition, at 11a-43a.

STATEMENT OF THE CASE

On November 21, 1990, respondent SCPSA, an agency of the State of South Carolina, filed a civil action in the Court of Common Pleas of Berkeley County, South Carolina (No. 90-CP-08-1760). That suit concerns the corruption of Joe C. Norman (now deceased), who until 1989

was SCPSA's vice president.[2] SCPSA's state court complaint, as amended, alleges that Mr. Norman was induced to betray SCPSA through payment of cash and valuables by Clyde E. Goins and two corporations of which Mr. Goins was president, Great Western Coal Inc. and Great Western Coal (Kentucky), Inc. (collectively "Great Western"), the petitioners herein. The amended complaint makes claims under state law against Great Western and against Mr. Norman and Mr. Goins for breach of Mr. Norman's fiduciary and contractual duties, inducement of that breach, fraud, and civil conspiracy.

Instead of responding to SCPSA's complaint, Great Western commenced the present action in the United States District Court for the Eastern District of Kentucky against SCPSA and its President and Chief Executive Officer, Kenneth R. Ford, in his official capacity. Great Western contended that SCPSA should be compelled to arbitrate its state court claims pursuant to the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1 *et seq.*, because of commercial arbitration provisions in two coal purchase contracts. Because the FAA does not independently confer federal jurisdiction,[3] Great Western alleged that there

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[2] On September 11, 1991, an indictment was returned against Mr. Norman in federal court in Columbia, South Carolina, for offenses related to SCPSA's corruption claims. Mr. Norman died on February 2, 1992, the week before his trial on that indictment was to begin.

[3] *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 25 n.32 (1983).

was diversity of citizenship between it and SCPSA.[4] Great Western moved for a preliminary injunction to bar SCPSA from proceeding with any claim against any of the four defendants in its South Carolina action, and to compel SCPSA to arbitrate its dispute with all of them.

SCPSA moved under Fed.R.Civ.P. 12(b)(1) to dismiss Great Western's federal complaint for lack of subject matter jurisdiction. SCPSA contended that diversity of citizenship was lacking because SCPSA, as an arm of the State of South Carolina, is not a citizen of that State. SCPSA also opposed the motion for a preliminary injunction.

In an oral ruling at the hearing on these motions on January 18, 1991, Chief Judge Eugene E. Siler, Jr., denied the motion for a preliminary injunction. Judge Siler confirmed his ruling in a written order of January 24, 1991. Great Western appealed to the United States Court of Appeals for the Sixth Circuit. While that appeal was pending, the district court on August 28, 1991, granted SCPSA's motion to dismiss. Judge Siler's memorandum opinion noted that numerous state and federal decisions from South Carolina have held that SCPSA is an arm of

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[4] Great Western states that "[i]t is undisputed . . . that [SCPSA] is incorporated in South Carolina with its principal place of business in that State . . . . " Petition, at 3 n.5. SCPSA has maintained consistently in this litigation that it is not a private corporation nor analogous to one, but is an arm and alter ego of the State of South Carolina. The statute creating SCPSA designates it "a body corporate and politic," S.C. Code § 58-31-10, and it is subject to none of the registration requirements applicable to domestic corporations in South Carolina.

the State.[5] After his own analysis of SCPSA's standing as the "arm" or "alter ego" of the State of South Carolina, Judge Siler concluded that there is no federal jurisdiction. Petition App., at 7a-8a.

Great Western appealed the August 28 order, and the two appeals were consolidated before the Sixth Circuit.

After Judge Siler denied a preliminary injunction in January 1991, Great Western, joined by Messrs. Norman and Goins, moved in the South Carolina Court of Common Pleas to dismiss SCPSA's claims and compel arbitration. Great Western's arguments echoed the arguments that it had made in its federal action in Kentucky. The South Carolina Court of Common Pleas on September 4, 1991, denied *in toto* the defendants' motions to compel arbitration. Great Western and the other state defendants

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[5] For example, the South Carolina Supreme Court has held that SCPSA is not subject to regulation (as is a private utility) by the South Carolina Public Service Commission, for SCPSA "is, in effect a State agency just as the Public Service Commission is . . . . " *South Carolina Electric & Gas Co. v. South Carolina Public Service Authority*, 215 S.C. 193, 54 S.E.2d 777, 786 (1949). In another case that Judge Siler cited, the state Supreme Court declared that SCPSA "is completely identified with the State in the performance of its public functions, which are unquestionably of a governmental character." *Rice Hope Plantation v. South Carolina Public Service Authority*, 216 S.C. 500, 59 S.E.2d 132, 138-39 (1950). Since 1951, the federal courts in South Carolina have held that SCPSA is an arm of the State, not subject to diversity jurisdiction, and sharing in the state's Eleventh Amendment immunity. *Dupont v. South Carolina Public Service Authority*, 100 F. Supp. 778 (E.D.S.C. 1951).

have appealed that decision to the South Carolina Supreme Court.[6]

On December 9, 1991, the Sixth Circuit affirmed the dismissal of Great Western's federal action "for the reasons stated by the District Court Judge Eugene E. Siler, Jr. in his Memorandum filed August 28, 1991." Petition App., at 2a.[7] Great Western's certiorari petition seeks review of this decision.

Judge Siler's August 28, 1991, memorandum sets forth a number of facts showing that SCPSA is an

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[6] The parties' briefs and the record have been filed. The parties have been notified that the case likely will be heard during May 1992.

[7] The relevant circumstances of this case are comparatively simple and are described above. Nonetheless, Great Western has fought strenuously to avoid resolution of SCPSA's claims in the South Carolina state courts, and the dispute between it and SCPSA has become quite complex as a result. Great Western's counter-initiative against SCPSA after SCPSA filed its tort claims in the Court of Common Pleas has included two federal complaints for injunctions against the state court proceedings in two district courts and three appeals by Great Western, in the courts of appeals for the Fourth and Sixth Circuits. Great Western also has taken three interlocutory appeals to the South Carolina Supreme Court – presenting the same issues that it has attempted to litigate in the federal courts. Two of those appeals are currently pending in the South Carolina Supreme Court.

Great Western's certiorari petition presents a one-sided and misleading account of these other facets of the dispute between it and SCPSA, but these other circumstances are largely irrelevant to the single issue on which Great Western seeks certiorari. To date, no court, federal or state, trial or appellate, has found or adopted either the "facts" or the "law" from which Great Western fashions the account presented in its petition.

instrumentality of the State, serving important state-wide purposes. Petition App., 7a-8a. SCPSA operates throughout the State, S.C. Code § 58-31-10, "for the benefit of all the people of the State, for the improvement of their health and welfare and material prosperity . . . . " § 58-31-80. SCPSA develops rivers for commerce, navigation, production, and electric power. It acquires and sells water, reclaims land, and reforests watersheds and rivers. § 58-31-30. Like other state entities, SCPSA may condemn land, *id.*, and it enjoys tax exemption. § 58-31-80.

SCPSA is designated as a "body corporate and politic," § 58-31-10, but it is intricately intertwined, both politically and financially, with the State. SCPSA's Board of Directors are appointed by the Governor with the advice and consent of the state Senate, from each congressional district, specified counties, and the State at large. § 58-31-20. The Board of Directors reports to an Advisory Board consisting of the Governor, Attorney General, Treasurer, Comptroller, and Secretary of State. *Id.* The Governor must submit to the General Assembly an annual report including a financial statement and audit of SCPSA's operations. *Id.* SCPSA submits its annual budget to the House Ways and Means Committee for printing "as a regular part of the General Appropriation Act," § 58-31-400, and SCPSA's net earnings are paid semi-annually to the general fund of the State. § 58-31-110.

In its petition for certiorari, Great Western now contends that SCPSA has an "essentially local character," Petition, at 9, but in the district court Great Western conceded that SCPSA's responsibilities are state-wide. Respondents have attached hereto as Appendix A the

affidavit of the Honorable Carroll A. Campbell, Jr., Governor of the State of South Carolina, which they submitted to Judge Siler. Governor Campbell attested that SCPSA serves "State-wide public purposes." App. A, at 1a. At the January 18, 1991, hearing before Judge Siler, counsel for Great Western said, "We don't take much issue with what the governor says in that affidavit on issues of fact." (Tr. Jan. 18, 1991, at 49) Instead, Great Western argued that the facts did not show SCPSA to be an arm of the State.

Great Western's certiorari petition cites the fact that SCPSA's direct electric service area lies within 3 of the 46 counties in the State. Petition, at 9 (citing S.C. Code § 58-31-330). SCPSA's responsibilities, however, include the transmission of electricity to the 35 counties of the Central Electric Power Cooperative, Inc. *See* § 58-31-320. To accomplish its mission, SCPSA operates an integrated transmission system spanning more than 75 percent of the State's geographic area, and including some 3,647 miles of lines that SCPSA owns or leases. *See South Carolina Electric & Gas Co. v. South Carolina Public Service Authority*, 215 S.C. 193, 54 S.E.2d 777 (1949) (upholding SCPSA's right to maintain and operate transmission system and sell to Cooperative's membership).

Great Western's petition also cites the fact that SCPSA's duty to develop rivers and reforest watersheds, among other functions, extends only to the Santee, Cooper, and Congaree Rivers. Petition, at 9 & n.12 (citing § 58-31-30). But "[o]f South Carolina's three major river systems, the largest is the Santee. It and its tributaries in the Piedmont and Blue Ridge drain nearly 40 percent of the state's total area." C. Kovacik & J. Winberry, South

CAROLINA: THE MAKING OF A LANDSCAPE, 27 (1989). SCPSA's responsibilities for this river system are not merely local.[8]

In sum, SCPSA's responsibilities are state-wide.

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[8] When the South Carolina General Assembly established SCPSA in the midst of the Great Depression, SCPSA's principal task was the completion of the Santee-Cooper Project. *See* S.C. Code § 58-31-160. The Project, which SCPSA operates to this day, is a vast inland waterway and hydroelectric project, intended to promote economic progress and rural electrification throughout the State, as well as provide recreation and foster conservation. As one early account explained, the Santee-Cooper Project utilizes "Carolina's greatest watershed, including the Catawba, Broad, Wateree, Pacolet, Saluda, Enoree, Tyger, Congaree and other great rivers that converge into the Santee . . . . " J. Ziegler, *The Santee-Cooper Project*, SOUTH CAROLINA MAGAZINE, at 36-38 (Mar. 1945), *reprinted in* SOUTH CAROLINA: A DOCUMENTARY PROFILE OF THE PALMETTO STATE, at 606 (E. Johnson & K. Sloan, eds., 1971).

The same writer described the state-wide significance of the Santee-Cooper Project:

> For the first time in the history of the State we are developing adequate power in the coastal regions in close proximity to our harbor and shipping facilities. This development means much to South Carolina. It is rapidly becoming the motivating force of inevitable industrial expansion which is being felt not only in the tide-water regions, but throughout the State. Already new industries are pointing the way to other newcomers, as they recognize and advertise the unusual advantages which South Carolina offers. . . .

Id. at 607.

SCPSA is known as "Santee Cooper" because of its identification with the Santee-Cooper Project.

REASONS FOR DENYING CERTIORARI

I. THIS CASE IS MOOT.

Even if there were need to revisit the "arm of the State" test from *State Highway Comm'n of Wyoming v. Utah Construction Co.*, 278 U.S. 194 (1929), which this case involves, this case is not the right vehicle for that reexamination.

The South Carolina Court of Common Pleas has rejected the same arbitration claim that Great Western made in this federal action. The state court's decision is res judicata, and it makes this action moot. In *Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1 (1983), this Court held that under exactly these circumstances, the federal courts could proceed no further with an action under the Federal Arbitration Act. Once a state trial court had decided the arbitrability of the dispute, "the state court's judgment on the issue would be res judicata," and "there would be no further litigation in the federal forum" on the same issue. *Id.* at 10.

Even if there were diversity between SCPSA and Great Western, "there [could] be no further litigation in the federal forum" on Great Western's arbitration claim.

II. THERE IS NO NEED FOR REEXAMINATION OF THE TEST FOR DETERMINING WHICH ENTITIES ARE "ARMS OF THE STATE."

"There is no question that a State is not a 'citizen' for purposes of the diversity jurisdiction." *Moor v. County of Alameda*, 411 U.S. 693, 717 (1973) (citing *Postal Telegraph*

Cable Co. v. Alabama, 155 U.S. 482, 487 (1894)). Moreover, no state agency or other state entity may be sued as a "citizen" of the State that created it, unless the entity is so independent that it is not the State's "arm." *State Highway Comm'n of Wyoming v. Utah Construction Co.*, 278 U.S. 194 (1929). There the Court ruled that the State Highway Commission could not be haled into a district court under diversity jurisdiction, for the State "act[ed] through the highway commission," which "was but the arm or alter ego of the state." *Id.* at 199. Because the State clearly was acting through the commission, the Court found that the commission's power to sue and be sued was irrelevant. *Id.*

This case involves the *Wyoming Highway Commission* "arm of the State" test. The courts below applied this test just as it has been applied in numerous other decisions.

This Court has said repeatedly in the Eleventh Amendment context that whether an entity is an arm of the State involves "questions of fact and state law," *Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 515 n.19 (1982), especially "the nature of the entity created by state law." *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 280 (1977).[9] No single factor is likely to be determinative, such as whether the agency is a "body corporate," or is otherwise empowered "to sue and be sued." *Florida Dept. of Health and Rehabilitative Services v. Florida Nursing Home Ass'n*, 450 U.S. 147, 150 (1981) (per curiam). "[T]he court must look to any and all available

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[9] *See* Petition, at 12 n.15 ("virtually the same analysis" used in Eleventh Amendment "arm of the State" cases as in diversity cases).

sources for guidance." Often, "some factors will suggest that the agency is a 'citizen' while others will just as strongly suggest that the agency is merely an alter ego of the state." In that circumstance, "[t]he court must balance these [factors] against each other . . . . " *Tradigrain v. Mississippi State Port Authority*, 701 F.2d 1131, 1132-33 (5th Cir. 1983). The ultimate questions are whether "the entity . . . is so intricately intertwined with the State that it can best be understood as an 'arm of the State,' " or, alternatively, whether "the State, though not a nominal party, is the real party in interest." *Port Auth. Trans-Hudson Corp. v. Feeney*, 110 S. Ct. 1868, 1876 (1990) (Brennan, J., concurring).

Decisions applying this Court's "arm of the State" test are necessarily fact-specific. A number of cases have identified factors that might be relevant. But no detailed code of instructions could eliminate the need for the courts to exercise their judgment by weighing competing factors – precisely as the lower courts did in this case. There is no reason for the Court to grant certiorari to address again this issue.

Great Western nonetheless maintains that certiorari should be granted because of an alleged conflict between the decision of the Sixth Circuit in this case, and this Court's decision in *Moor v. County of Alameda*, 411 U.S. 693 (1973). Petition, at 6-11. Great Western also alleges that the lower courts applying the "arm of the State" test have produced a "confusing hodge-podge of decisions," reflecting "the lack of principled decisionmaking on this

issue." Petition, at 12-13. Both of these assertions are incorrect.[10]

A. Great Western Has Misread *Moor*.

This case and *Moor* concern different rules. The present case concerns the rule of *Wyoming Highway Commission* that a state agency acting as an arm of the State is not a citizen of the State, while *Moor v. County of Alameda* concerned the rule of *Cowles v. Mercer County*, 74 U.S. (7 Wall.) 118 (1869), that local governmental units such as counties and municipalities are citizens of their States.[11]

In *Moor*, the Court examined the status of counties under California law and found no reason to exempt the counties of that State from the ordinary rule that local governmental units are subject to federal diversity jurisdiction. *Moor* reversed the decision of the Court of Appeals for the Ninth Circuit, which had bestowed on the counties of California an exemption from federal diversity jurisdiction. This Court held that *Cowles v. Mercer County* applies in California, just as it applies everywhere else in the nation. *Id.* at 721.

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[10] Great Western does not try to demonstrate any conflict between the Sixth Circuit's decision in this case and any other lower court decision. The court of appeals' decision was consistent with *Dupont v. South Carolina Public Service Authority*, 100 F. Supp. 778 (E.D.S.C. 1951).

[11] The difference in treatment accorded local and state governments grows out of the tradition since colonial times that municipalities are "natural persons for virtually all purposes of constitutional and statutory analysis." *Owen v. City of Independence, Missouri*, 445 U.S. 622, 638-39 (1980).

The present case involves a different issue, namely whether a state agency is an "arm of the state." The district court and court of appeals examined the factors that are relevant to determining the extent of SCPSA's intertwining with the State. It should be no surprise that somewhat different factors are controlling in this case from those in *Moor*, given that *Moor* involved a county and this case involves a state agency. That different factors are relevant is no reason for granting certiorari.

Great Western, however, seems to find two universal tests in the Court's opinion in *Moor*, and implies that one or the other of these should govern not only a case like *Moor*, involving an issue of whether the counties of a particular state should be exempted from the rule of *Mercer County*, but also the entirely different issue of whether a state agency is an arm of the State under *Wyoming Highway Commission*.

Great Western first reads *Moor* to hold that "an entity's corporate status [is] determinative." Petition, at 7. One page later, however, Great Western implies that *Moor* established a 10-factor test, of which corporate status is merely one, Petition, at 8, and criticizes the Sixth Circuit for not finding SCPSA independent of the State under these 10 factors. Petition at 9-11.

In reality, *Moor* established neither of these "tests." *Moor* did not hold "corporate status" to be "determinative" of anything – not even the issue in that case. *Moor* noted only that the "original basis" for the ruling in *Mercer County* that counties were subject to diversity jurisdiction was an analogy between the county board of supervisors and a private corporation. 411 U.S. at 718. If

corporate status had been determinative, the Court in *Moor* would not have gone on to examine an array of 10 factors.

Great Western's alternative reading, that *Moor* established a 10-point universal test of whether any entity is an arm of the State, is equally inaccurate. In *Moor*, the Court simply identified the factors that were especially relevant in the context of that particular case. The lower courts in the present case did the same. There is no conflict between *Moor* and the decision of the lower courts in this case.[12]

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[12] Great Western seemingly would require the federal courts to disregard any factor not listed in *Moor*. Judge Siler cited several factors, not mentioned in *Moor* because they were not relevant to that case, but all showing the political and financial intertwining of SCPSA with the State. To require that these factors be ignored would be illogical.

Even Great Western's application of the 10 factors from *Moor* is erroneous. Most importantly, Great Western characterizes SCPSA as "essentially local," Petition, at 9, but SCPSA and the public services that it provides are state-wide. Pp. 7-9, *supra*. Moreover, Great Western has ignored the fact that SCPSA's net earnings go to the state's general funds "to reduce the tax burdens on the people of this State." S.C. Code § 58-31-110. The legislature also has placed substantial limits, which Great Western does not mention, on SCPSA's power to acquire or dispose of assets. S.C. Code §§ 58-31-30, 58-31-50; *see Creech v. South Carolina Public Service Authority*, 200 S.C. 127, 20 S.E.2d 645 (1942) (SCPSA is not empowered to acquire existing utility). Further, SCPSA's power to sue and be sued is limited by sovereign immunity, *Rice Hope Plantation v. South Carolina Public Service Authority*, 216 S.C. 500, 59 S.E.2d 132 (1950), whose scope is now set by the South Carolina Tort Claims Act. S.C. Code §§ 15-78-10 *et seq.*

B. There Is No Need for Guidance to the Lower Courts on Applying *Wyoming Highway Commission*.

Great Western presents two long string-cites of cases. One set of cases finds certain state entities to be arms of their respective States, and the other set finds "functionally similar entities" not to be. Great Western then pronounces that "[t]hese decisions cannot be reconciled." *Id.* On more than cursory examination, however, all of this alleged irreconcilability, with the exception of two cases,[13] shows only that the lower federal courts have reached different results on different facts.

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[13] Great Western cites *State ex rel. Guste v. Home Depot, Inc.*, 589 F. Supp. 1254 (E.D. La. 1984), holding that the Louisiana Department of Urban and Community Affairs ("DUCA") was an arm of the State, and *State ex rel. Guste v. The Fedders Corp.*, 524 F. Supp. 552 (M.D. La. 1981), holding the contrary. In both of those cases, the DUCA brought enforcement actions in state court under state unfair trade practice and consumer protection laws. The defendants then removed the cases to federal court, alleging diversity, and the DUCA moved to remand.

As the 1984 *Home Depot* decision explained, *Fedders Corp.* in 1981 erroneously treated as determinative the fact that the DUCA was designated a "body corporate," a classification that included some 20 Louisiana executive agencies. 589 F. Supp. at 1256. The Fifth Circuit's 1983 decision in *Tradigrain, Inc. v. Mississippi State Port Authority*, 701 F.2d 1131 (5th Cir. 1983), then emphasized the need for a more rounded analysis of an entity's nature and its mission under state law. After *Tradigrain* was decided, the Middle District of Louisiana evidently abandoned *Fedders Corp.*, in *Kurkiewicz v. State*, 560 F. Supp. 911 (M.D. La. 1983). For at least the past nine years, the decisions within the Fifth Circuit have been in harmony.

For example, Great Western cites both *Tradigrain v. Mississippi State Port Authority*, 701 F.2d 1131 (5th Cir. 1983), and *Indiana Port Comm'n v. Bethlehem Steel Corp.*, 702 F.2d 107 (7th Cir. 1983). Those decisions are consistent. Both followed this Court's instruction that the courts must look to "the nature of the entity created by state law." *Mt. Healthy City School Dist. Bd. of Ed. v. Doyle*, 429 U.S. 274, 280 (1977).[14] In *Mississippi State Port Authority*, the Fifth Circuit examined state statutory and decisional law and concluded "that the legislature considered the Authority an alter ego of the State." 701 F.2d at 1133. In *Indiana Port Comm'n*, the court also analyzed state law, but the analysis yielded a different result. The Seventh Circuit found that, under the law of Indiana, the Port Commission was " 'separate from the state,' " and was " 'not the state in its sovereign corporate capacity.' " 702 F.2d at 109 (quoting Indiana Supreme Court). The salient point is not, as Great Western would have it, that the courts reached different results, but that they did so through a consistent analysis – both looked to state law. Judge Siler's analysis also was consistent, for, as he noted, South Carolina law has declared that SCPSA "is completely identified with the State . . . . " *Rice Hope Plantation v. South Carolina Public Service Authority*, 216 S.C. 500, 59 S.E.2d 132, 138-39 (1950). *See* n.5, *supra*.

Great Western has failed to show how any new instructions from this Court could usefully clarify the

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[14] *See also Patsy v. Board of Regents of the State of Florida*, 457 U.S. 496, 515 n.19 (1982) (stressing "the importance of state law").

multi-factor "arm of the State" test, or why such clarification is needed.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: April 7, 1992.

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APPENDIX A

AFFIDAVIT OF CARROLL A. CAMPBELL, JR.

PERSONALLY appeared before me, CARROLL A. CAMPBELL, JR., who, being first duly sworn, deposes and says:

1. I am Governor of the State of South Carolina and, in that capacity, serve on the advisory board to the South Carolina Public Service Authority (Santee Cooper).

2. Santee Cooper is an instrument and arm of the State of South Carolina, and it serves essential public functions. Its provision of electrical power is such a function, but the Statewide public purposes that it serves do not end there.

3. Among other things, Santee Cooper assures navigation along the Santee and Cooper Rivers between Charleston and Columbia, South Carolina, and thereby fosters commerce between the two principal cities of the State; it is responsible for flood control along South Carolina waterways; it conducts State reforestation programs; it develops and maintains State recreational facilities; it undertakes State land reclamation projects; and it participates in the management of State wildlife programs. In all of these undertakings, Santee Cooper performs critical State functions that would otherwise be performed by other State departments or agencies, if the State were able to perform them at all.

4. The Governor of the State appoints the members of the Board of Directors of Santee Cooper, subject to the advice and consent of the Senate.

5. By law, five constitutional State officers constitute Santee Cooper's Advisory Board, namely: the Governor,

the Attorney General, the State Treasurer, the Comptroller General and the Secretary of State. The Advisory Board provides advice and support to Santee Cooper. In addition, Santee Cooper's Directors must report to the Advisory Board annually on the operations and finances of the agency. The Advisory Board is required each year to appoint an accountant or accounting firm to conduct a complete audit of the affairs of Santee Cooper.

6. As Governor, I must report annually to the South Carolina General Assembly concerning the work and finances of Santee Cooper, and I must provide the legislature with the audit that the Advisory Board has commissioned.

7. Santee Cooper's operations and finances are interconnected with the finances of the State generally. Earnings from Santee Cooper's operations are paid into the State Treasury semi-annually and are handled, like other State revenues, within the State's budgeting processes.

8. In order to achieve a balanced budget, the State must assure that appropriations do not exceed overall revenues. Consequently, reductions in revenues from Santee Cooper would either mean a corresponding reduction in the State's ability to appropriate, or would require an increase in revenues from other sources.

9. Santee Cooper is included within the annual State of South Carolina Financial Statement because Santee Cooper is integral to the State itself. The Notes to the most recent State Financial Statement (Attachment A hereto) indicate the criteria by which Santee Cooper was included. Note 1.a. states (emphasis supplied):

These financial statements include all component units over which the State's elected officials exercise significant oversight responsibility. *Financial interdependency is the most important element of oversight responsibility.* However, the following also were considered in determining the scope of the reporting entity:

Selection of governing authority
Designation of management
Ability to significantly influence operations
Accountability for fiscal matters

Note 15 enumerates important State organizations and foundations that, by application of these criteria, despite their importance were *not* included within the State Financial Statement.

10. For these reasons, among others, Santee Cooper performs functions of the State of South Carolina, and its operations and finances cannot be severed from those of the State itself. Indeed, its work and its finances are those of the State.

Subscribed and sworn to
before me this 15th
day of January, A.D. 1991.

/s/
CARROLL A. CAMPBELL, JR.

/s/ (SEAL)
NOTARY PUBLIC FOR
SOUTH CAROLINA
My Commission expires 3-21-95.

[ATTACHMENT A OMITTED]

(3)

No. 91-1433

Supreme Court, U.S.
FILED
APR 15 1992
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

GREAT WESTERN COAL (KENTUCKY), INC. and GREAT WESTERN COAL INC.,
Petitioners,

v.

SOUTH CAROLINA PUBLIC SERVICE AUTHORITY and KENNETH R. FORD,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITIONERS' REPLY MEMORANDUM

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PETITIONERS' REPLY MEMORANDUM

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1. Santee Cooper's Opposition [1] effectively concedes Great Western's principal point: the federal courts have developed no clear standard for determining whether a state-owned corporation is a "citizen" of a "State" for diversity purposes. As Santee Cooper appears to acknowledge, Opp. 12, the courts engage in an *ad hoc* balancing of various "factors" that they consider relevant to the issue—a balancing that frequently (as in this case) smacks of an after-the-fact attempt to justify the court's result.

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[1] Santee Cooper's Brief in Opposition to Petition for a Writ of Certiorari will be cited as "Opp." Great Western's petition will be cited as "Pet." The Appendix that accompanies the petition will be cited as "App."

2. As Great Western demonstrated in its petition, Pet. 6-8, this Court's decisions in *Cowles* v. *Mercer County*, 74 U.S. (7 Wall.) 118 (1869), and *Moor* v. *County of Alameda*, 411 U.S. 693 (1973), provide guidance on the citizenship issue. *Cowles*—reaffirmed in *Moor*—concluded that a separately incorporated entity with the power to enter into contracts had sufficient independence from the state to be a "citizen." Such a bright-line standard—if reaffirmed by this Court—would bring much-needed clarity and simplicity to a muddled area of federal jurisdiction.[2] Such a clear standard would avoid the extensive jurisdictional briefing and argument and the lengthy fact-bound opinions that frequently result from the standardless approach that the courts now use.

3. *Moor* set forth ten factors which confirmed its conclusion that Alameda County was a "citizen." Pet. 8-11 (discussing *Moor* factors). If further refinement beyond the *Cowles* standard is needed, the *Moor* factors provide it. The lower courts in this case ignored both Santee Cooper's separate corporate status and corporate powers (found determinative in *Cowles*) and the other factors that the Court examined in *Moor*.

4. Santee Cooper insists that "[t]his case and *Moor* concern different rules" because *Moor* involved a "local governmental unit[]" while this case involves a "state agency

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[2] The *Cowles* and *Moor* standard may be "more useful for describing the vast majority of cases that come within the district courts' original jurisdiction than it is for describing which cases are beyond district court jurisdiction." *Franchise Tax Board* v. *Construction Laborers Vacation Trust*, 463 U.S. 1, 9 (1983) (describing Justice Holmes' test for federal question jurisdiction). Thus, an entity that is separately incorporated with corporate powers is a "citizen" of a "State" for diversity purposes under *Moor* and *Cowles*. An entity that is not separately incorporated, or that does not have corporate powers, might still be a "citizen" (rather than an "arm" or an "*alter ego*" of the state) if it has other indicia of independence.

acting as an arm of the State." Opp. 13.[3] But there is no suggestion in *Moor* of this distinction. Nor does Santee Cooper explain what difference such a distinction would make if it existed. Whether an entity is labeled a "state agency" or "a local governmental unit," the inquiry for diversity purposes is precisely the same: whether the entity is so closely associated with the state as to be "simply 'the arm or *alter ego* of the State.' " *Moor*, 411 U.S. at 717 (applying "arm or *alter ego*" test to county) (quoting *State Highway Commission of Wyoming* v. *Utah Construction Co.*, 278 U.S. 194, 199 (1929) (applying identical test to state highway commission)).

5. Contrary to Santee Cooper's suggestion (Opp. 14), *Cowles* and *Moor* on one hand and *Utah Construction Co.* on the other do not employ different modes of analysis for different kinds of entities. Those cases establish a single standard applicable to all entities. Their results are entirely consistent in light of the nature of the entity at issue in each case. The entity in *Utah Construction Co.*—the Wyoming State Highway Commission—was not separately incorporated. *Utah Construction Co.* v. *State Highway Commission of Wyoming*, 23 F.2d 638, 644 (8th Cir. 1927) (Scott, J., dissenting) (statute creating Commission "does not purport to create a corporation, but in my opinion a mere commission to which is committed the execution of particularly described duties"), *rev'd*, 278 U.S. 194 (1929); *see* 278 U.S. at 196-97 (describing Commission's governing statutes). The contracts on which the claims in that case rested were entered into by " 'the state of

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[3] Even if this purported distinction were significant, it is far from clear that Santee Cooper would fall into the "state agency" category. Santee Cooper's governing statute expressly recognizes it as a "body corporate *and politic*," S.C. Code Ann. § 58-31-10 (emphasis added), much like a county or other "local governmental unit." Similarly, the courts of South Carolina have repeatedly characterized Santee Cooper as a "quasi-municipal corporation." *SCPSA* v. *Citizens & Southern National Bank*, 386 S.E.2d 775, 786 (S.C. 1989); *Rice Hope Plantation* v. *SCPSA*, 59 S.E.2d 132, 138 (S.C. 1950); *Creech* v. *SCPSA*, 20 S.E.2d 645, 648 (S.C. 1942).

Wyoming, acting through the state highway commission.'" *Id.* at 197 (quoting contract). Thus, "[t]he state acting through the highway commission, as it might through any officer, became a party to the original agreement and obligated herself thereby. Neither the commission nor any of its members assumed any direct or personal responsibility." *Id.* at 199.

6. In *Cowles* and *Moor*, by contrast—as in this case—the entities at issue were separately incorporated. They had the power to enter into contracts in their own name, and they had other corporate powers as well. Thus, *Utah Construction Co.* on one hand and *Cowles* and *Moor* on the other represent straightforward applications of the same principle: an entity that is separately incorporated with corporate powers is *not* a mere "arm or *alter ego* of the State." An entity that is not separately incorporated (and that does not have corporate powers) *may be* an "arm or *alter ego* of the State." The district court and the court of appeals below ignored the principle reflected in these cases.

7. Santee Cooper does not (and could not) dispute that it is separately incorporated and that it has corporate powers, including the power to enter into contracts.[4] Nor does it dispute that the ten *Moor* factors weigh overwhelmingly against its claim that it is a mere arm of the state. The only *Moor* factor on which Santee Cooper directly contests Great Western's characterization is the

[4] *See* S.C. Code Ann. §§ 58-31-10 ("body corporate and politic"), -30 (corporate powers), -110 (Santee Cooper "is a corporation"); *id.* § 58-31-30(17) (Santee Cooper has the power to "make contracts of every name and nature"). Santee Cooper asserts that it "is not a private corporation nor analogous to one" and that it is "subject to none of the registration requirements applicable to domestic corporations in South Carolina." Opp. 4 n.4. These observations, whether or not accurate, miss the point: by separately incorporating Santee Cooper and giving it extensive corporate powers, the South Carolina legislature clearly intended to give it an existence separate from the State of South Carolina.

third—its essentially local character. Opp. 7-9 & n.10.[5] But Santee Cooper's own discussion of this issue—which largely ignores the explicit statutory limits on its authority—underscores the fact that its activities extend only to certain portions of the state.[6]

8. The ten factors that the Court examined in *Moor* are not merely "factors that were especially relevant in the context of that particular case," as Santee Cooper insists. Opp. 15. Rather, the factors that the Court considered—including, for example, the entity's separate corporate status, its power to sue and be sued, its power to enter into contracts, its power to acquire and sell prop-

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[5] Santee Cooper's contention that Great Western "conceded that [Santee Cooper's] responsibilities are state-wide" in the district court (Opp. 7) is wrong. Great Western made no such concession, and the portions of the record cited in the Opposition do not reflect one. The question of Santee Cooper's local or state-wide character was hotly disputed and thoroughly briefed in the court of appeals, and Santee Cooper never contended there that Great Western had "conceded" the issue.

[6] Santee Cooper briefly addresses two other *Moor* factors—its power to acquire and dispose of assets, and its power to sue and be sued. Opp. 15 n.12. The "substantial limits" that Santee Cooper purports to find on its power to acquire and dispose are minor indeed; they consist solely of a restriction on the power of the board of directors to sell *all* of Santee Cooper's physical property, S.C. Code Ann. § 58-31-30, and an approval requirement for purchases of property without condemnation from private corporations, *id.* § 58-31-50. These provisions impinge only slightly on Santee Cooper's broad power "[t]o acquire, purchase, hold, use, lease, mortgage, sell, transfer, and dispose of any property, real, personal or mixed, or any interest therein." *Id.* § 58-31-30(4).

Santee Cooper also insists that its power "[t]o sue and be sued," *id.* § 58-31-30(2), is limited by the South Carolina Tort Claims Act. Opp. 15 n.12. But the restrictions the SCTCA imposes on Santee Cooper's liability to suit have little, if any, bearing on its status as a "citizen." *See Chicot County* v. *Sherwood*, 148 U.S. 529, 533-34 (1893) (state legislature cannot eliminate federal jurisdiction by providing that county can be sued only in local courts).

erty, and its liability for judgments against it, *see* 411 U.S. at 719-20—are generally applicable to determining whether *any* entity is an arm or an *alter ego* of the state. Santee Cooper does not even try to explain why these factors are not as determinative in this case as they were in *Moor*.

9. Santee Cooper insists that the cases Great Western cited at Pet. 12-13 to illustrate the confusion in the lower courts merely "reached different results on different facts." Opp. 16. But these courts looked to different *factors*, rather than to different *facts*, and they did so without explanation. The two cases that Santee Cooper compares (Opp. 17) illustrate this point. In *Tradigrain* v. *Mississippi State Port Authority*, 701 F.2d 1131 (5th Cir. 1983), the court held the state port authority to be an arm of the state because of various statutory limitations on its powers. *See id.* at 1133. The court assigned little weight to the authority's corporate purposes and powers, including the power to sue and be sued, to enter into contracts, and to purchase, lease, and own property. *See id.* at 1133; *see also id.* at 1136-37 (Thornberry, J., dissenting) (weighing factors differently).

10. By contrast, in *Indiana Port Commission* v. *Bethlehem Steel Corp.*, 702 F.2d 107 (7th Cir. 1983), the court held the state port commission not to be an arm of the state because it was "an independent corporate entity seeking to assert its own rights in this action." *Id.* at 110. The court examined no other factors and conducted no further analysis.

11. Santee Cooper purports to harmonize these cases on the ground that both courts "looked to state law" to determine the entities' status. Opp. 17. But the role of state law in these and other federal cases presenting the "arm or *alter ego*" issue is more circumscribed than Santee Cooper suggests. As *Moor* makes clear, the choice of factors that the federal court will consider in determining whether an entity is a "citizen[]" (and the

weight to be accorded those factors) is a matter of *federal* law. State law serves only to determine which way the factors point in a particular case—for example, whether an entity (such as the County of Alameda in *Moor*) is separately incorporated and whether it has the power to enter into contracts.

12. *Tradigrain*, *Indiana Port Commission*, and the other cases cited in the petition are irreconcilable not because of differences in *state* law, but because the courts in those cases chose as a matter of *federal* law to give weight to different factors. It is this unprincipled selection and weighing of factors—exemplified by the decisions of the lower courts in this case—that this Court should correct.

13. Santee Cooper's claim of mootness (Opp. 10) is flatly wrong. Santee Cooper appears to argue that the decision of the state trial court rejecting Great Western's motion to compel arbitration bars Great Western's federal action under the Full Faith and Credit Act, 28 U.S.C. § 1738. The Full Faith and Credit issue was vigorously contested in the court of appeals. Great Western argued both as a matter of South Carolina law [7] and as a matter of due process [8] that the state court ruling was not en-

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[7] Under § 1738, a federal court must accord a state court judgment the same preclusive effect that it would receive in the state court where it was rendered. *See, e.g., Migra* v. *Warren City School District Board of Education*, 465 U.S. 75 (1984). South Carolina law does not accord preclusive effect to an order pending appeal *See Lowe* v. *Lowe*, 182 S.E.2d 75, 77 (S.C. 1971) ("Affirmance of the order of the lower court on this issue [alimony] would make *res judicata* the alimony issue."). As Santee Cooper acknowledges, Opp. 6 n.6, Great Western's appeal from the trial court's order refusing arbitration has been briefed before the South Carolina Supreme Court but has not yet been argued or decided. Under state law, therefore, the order is not entitled to preclusive effect.

[8] A federal court need not accord preclusive effect to a state court ruling if the state court ruling does not accord with due process. *See, e.g., Haring* v. *Prosise*, 462 U.S. 306, 313 (1983); *Lee*

titled to preclusive effect. The court of appeals did not reach these issues. This Court should grant certiorari, reverse the court of appeals' jurisdictional ruling, and remand for consideration of the Full Faith and Credit issue and the other issues in the case.

14. If the Court were to agree with Santee Cooper that the case is moot, the appropriate course would not be to deny the petition, as Santee Cooper contends. Rather, "[t]he established practice of the Court in dealing with a civil case from a court in the federal system which has become moot while on its way here or pending our decision on the merits is to reverse or vacate the judgment below and remand with a direction to dismiss." *United States* v. *Munsingwear, Inc.*, 340 U.S. 36, 39 (1950); *see, e.g., Burke* v. *Barnes*, 479 U.S. 361, 365 (1987).

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v. *Winston*, 717 F.2d 888, 895 (4th Cir. 1983), *aff'd on other grounds*, 470 U.S. 753 (1985). Great Western argued in the court of appeals that the order of the South Carolina trial court denied due process in two respects. First, there was no record evidence to support the state trial court's ruling that the arbitration clauses in the two coal contracts were unenforceable because of "fraud in the factum." Second, the state trial court denied Great Western the opportunity to confront and cross-examine the witness whose affidavit Santee Cooper presented to the state trial court and on which that court exclusively relied.

CONCLUSION

For the reasons stated above and in Great Western's petition, certiorari should be granted.

Respectfully submitted,

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